SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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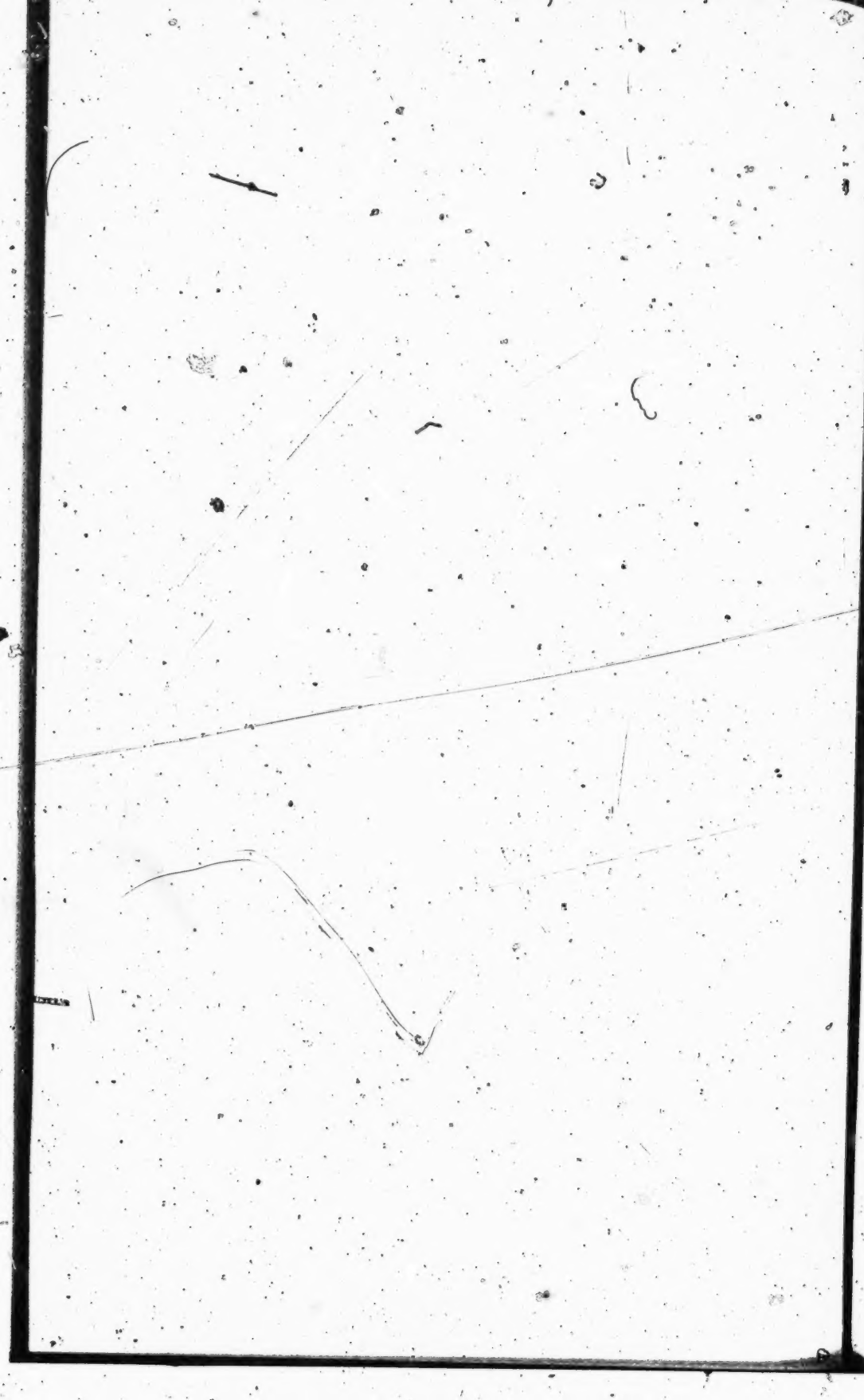

[fols. 1-4]

IN SUPREME COURT OF SOUTH CAROLINA

In the Original Jurisdiction

STATE OF SOUTH CAROLINA ex Relatione SIMPSON J. ZIMMERMAN, Individually and as Conservator of the Central Union Bank of South Carolina; Ibra C. Blackwood, Governor of the State of South Carolina, and Julian Scarborough, as a Member of and Representing the South Carolina Board of Bank Control, Petitioners,

against

HUNTER A. GIBBES, Representing Himself and All Other Depositors of the Central Union Bank of South Carolina Similarly Situated; the Court of Common Pleas for Richland County, and the Honorable W. H. Townsend, as Resident Judge of the Fifth Judicial Circuit, Respondents

ALTERNATIVE WRIT OF PROHIBITION

To the Respondents above named:

Upon reading and considering the annexed verified Petition, and upon motion of John M. Daniel, Attorney General, J. Ivey Humphrey, Assistant Attorney General, and of Melton & Belser, Attorneys for the petitioners,

You are hereby ordered and directed to show cause, if any you can, before the Supreme Court of South Carolina, at the Supreme Court Room, at Columbia, S. C., on Friday, April 14, 1933, at 3:30 P. M., why the relief prayed for in the Petition herein should not be granted and why a final Writ of Prohibition should not be forthwith issued to the [fol. 5] said Hunter A. Gibbes as plaintiff in the said suit mentioned in said Petition, to the Court of Common Pleas for Richland County, and to the Honorable W. H. Townsend as Resident Judge of the Fifth Judicial Circuit, restraining and enjoining them from further proceedings in the said cause and dissolving and dismissing the Rule to Show Cause and temporary restraining order therein issued and dismissing the said suit; and unless you show sufficient cause you are hereby so restrained and enjoined

and the said Writ of Prohibition will be issued and the relief prayed for in the Petition will be granted.

Let a copy of this Order be forthwith served upon the said Hunter A. Gibbes by delivery of a copy thereof to him personally, and upon the Court of Common Pleas for Richland County by delivery of a copy thereof to the Clerk of said Court, and to the Honorable W. H. Townsend, Resident Judge of the Fifth Judicial Circuit, by delivery of a copy thereof to him personally.

John G. Stabler, Associate Justice of the — South Carolina.

Columbia, S. C., 12 April, 1933.

[fol. 6] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR WRIT OF PROHIBITION

To Hon. Eugene S. Blease, Chief Justice; Hon John G. Stabler, Associate Justice; Hon. Jesse F. Carter, Associate Justice; Hon. T. P. Cothran, Associate Justice; Hon. M. L. Bonham, Associate Justice, as members of and constituting the Supreme Court of South Carolina:

This petition of the undersigned, Simpson J. Zimmerman individually and as Conservator of Central Union Bank of South Carolina, Ibra C. Blackwood, Governor of the State of South Carolina, and Julian Scarborough, as a member of and representing the South Carolina Board of Bank Control, petitioners, respectfully shows to this Honorable Court:

[fol. 7] 1. That the petitioner, Simpson J. Zimmerman, is a resident and citizen of the City of Columbia, S. C., and has recently been duly appointed Conservator of the Central Union Bank of South Carolina, a banking corporation organized and existing under the laws of the State of South Carolina, and is also a depositor in the said Bank, and that as such Conservator said petitioner is specifically charged with the responsibility for the administration of the affairs of the Central Union Bank of South Carolina under the Governor and the South Carolina Board of Bank Control.

2. That your petitioner, Ibra C. Blackwood, is the Governor of the State of South Carolina, and is also a member of the Board of Bank Control created under the Act hereinafter mentioned; and that your petitioner, Julian Scarborough, is the Treasurer of the State of South Carolina, and is also a member of the said Board of Bank Control; that said petitioner Ibra C. Blackwood as Governor of the State of South Carolina and Julian Scarborough as Treasurer of the State of South Carolina are members of the South Carolina Board of Bank Control appointed under the South Carolina Banking Act of March 9, 1933, and as members of such Board are charged with the responsibility of administering and conserving the assets of all the banks in the State of South Carolina, including the said Central Union Bank of South Carolina.

3. That Hunter A. Gibbes is a resident and citizen of Columbia, S. C., and has recently instituted a suit in the Court of Common Pleas for Richland County against these petitioners among others, purporting to act on behalf of himself and other depositors, in which the said Hunter A. Gibbes seeks among other things to have the South Carolina Banking Act passed by the South Carolina General Assembly and approved on March 9, 1933, declared unconstitutional, and also to have a Receiver appointed for the said [fol. 8] Central Union Bank of South Carolina and the said Bank liquidated in said Court; that a copy of said complaint is hereto attached and made a part of this petition.

4. That in connection with the said suit and based thereon the Hon. W. H. Townsend, Judge of the Fifth Judicial Circuit, issued a rule to show cause directing petitioners to show cause before him on May 4, 1933, why the relief prayed for should not be granted, accompanied by a temporary restraining order restraining all persons, including these petitioners, from proceeding in any court in connection with the assets and affairs of the said Central Union Bank of South Carolina except in and through the said proceeding; that a copy of such rule to show cause is also hereto attached and made a part of this petition.

5. That the said suit instituted by the said Hunter A. Gibbes is, as these petitioners are advised and believe, in direct conflict with the said Banking Act passed by the South Carolina General Assembly and approved on March

9, 1933, and is expressly prohibited by the said Act, and that the said suit was and is beyond, and in excess of, the jurisdiction of the said Court of Common Pleas for Richland County and of said Judge W. H. Townsend as the Judge thereof, and that the granting of the said rule to show cause and temporary restraining order was and is entirely unwarranted and illegal, and is and should be declared to be null and void.

6. That the said South Carolina Banking Act of March 9, 1933, was passed, as your petitioners are informed and believe, for the express purpose among other things of preventing suits such as the above mentioned suit instituted by the said Hunter A. Gibbes; that the institution of such a suit is expressly prohibited by the terms of the said Act, copy of which is hereto attached.

[fol. 9] 7. That the institution and pendency of the said suit is causing and will continue to cause to your petitioners, and to the many members of the public generally whom they represent, great and irreparable loss and damage; that the said suit and rule to show cause and temporary restraining order prevent petitioners from effectively and advantageously administering the affairs of the said Central Union Bank of South Carolina and of many other banks in the State of South Carolina, and cause great uncertainty and confusion as to the powers and responsibilities of your petitioners, resulting in great loss to the many depositors and creditors of the banks in the State of South Carolina, which have been placed in the hands of conservators pursuant to the provisions of said Act of the Legislature.

8. That your petitioners, pursuant to the duties and powers vested in them, are having an audit and investigation made as to the condition and affairs of the said Central Union Bank of South Carolina, but that the said audit has not yet been completed and it is impossible at this time to ascertain what is the true condition of the said Bank; that moreover the Board of Bank Control has heretofore issued instructions for notices to be sent out to the stockholders and directors of the said Central Union Bank of South Carolina (and of all the other Banks in the hands of Conservators) to hold meetings and advise prior to the 1st of May, 1933, as to whether the said Banks are to be or can be reorganized and reopened, and that such notices are about

to be issued by petitioners; that it is impossible to tell at this time, and prior to the completion of the said audit, whether or not the said banks will be reorganized or liquidated, and that the pendency of the said suit and Rule to Show Cause and temporary restraining order are prejudicial to the best interests of the said Bank and of its depositors and creditors.

[fol. 10] 9. That under these circumstances, as your petitioners are advised and believe, this Honorable Court should issue its writ of prohibition enjoining and restraining the said Hunter A. Gibbes as plaintiff, and the Court of Common Pleas for Richland County and the Hon. W. H. Townsend as the Resident Judge of the Fifth Judicial Circuit, from proceeding any further in connection with the said suit, and also directing and enjoining the said Judge Townsend to dissolve and vacate the said rule to show cause and temporary restraining order.

10. That your petitioners are without any other adequate remedy except by application to this Court for the said writ of prohibition; that the pendency of said suit ties the hands of the petitioners, causes uncertainty as to their powers and duties, and seriously hampers the administration of the affairs of the said banks; that it is impracticable to make application to the said Court of Common Pleas for Richland County for relief or to appeal from any adverse ruling by said Court without great delay and irreparable loss and prejudice.

11. That this is a matter of great pulbic importance, that it involves the constitutionality of the Banking Act of March 9, 1933, which was passed as an emergency measure in the present financial emergency; that the said Act is of great importance to the entire State of South Carolina and to all its inhabitants, affecting thousands and thousands of depositors and others interested in the Banks in the State of South Carolina; that the said Act was passed in the public interest and is and was entirely proper and constitutional, and that it is of great public importance that the said Act be construed and declared constitutional and upheld, and that the above mentioned suit and all the resulting uncertainty incident thereto be removed and prohibited; that the Board of Bank Control set up under the said Act [fol. 11] has issued various rules and regulations, copies of

which are hereto attached, and has appointed Conservators for numerous banks in the State of South Carolina, and that it is of urgent public importance that the said Act be construed and declared constitutional by this Honorable Court, and that suit be prohibited and dismissed.

Wherefore petitioners pray that a writ of prohibition be forthwith issued to the said Hunter A. Gibbes as plaintiff in the said suit, and to the Court of Common Pleas for Richland County and to Hon. W. H. Townsend, as Judge of the Fifth Judicial Circuit, restraining and enjoining them from further proceedings in the said case, and dissolving and dismissing the rule to show cause and temporary restraining order therein issued, and dismissing said suit.

John M. Daniel, Attorney General; J. Ivey Humphrey, Asst. Attorney General; Melton & Belser, Attorneys for Petitioners.

Columbia, S. C., April 12, 1933.

[fol. 12] *Duly sworn to by S. J. Zimmerman and J. H. Scarborough. Jurats omitted in printing.*

[fol. 13] IN COURT OF COMMON PLEAS OF RICHLAND COUNTY

HUNTER A. GIBBES, Representing Himself and All Other Depositors Similarly Situated, Plaintiff,

against

SIMPSON J. ZIMMERMAN, Individually and as Conservator of Central Union Bank; Honorable Ibra C. Blackwood, Governor of the State of South Carolina; Honorable Julian Scarborough, as a Member of and Representing the South Carolina Board of Bank Control; Albert S. Fant, State Bank Examiner; Richland County, South Carolina; the City of Columbia, and John Doe, Defendants

RULE TO SHOW CAUSE

To the defendants above named:

You, and each of you, are hereby required to show cause before me at Chambers in Columbia, S. C., on the fourth

day of May, 1933, at eleven o'clock A. M., or as soon thereafter as counsel can be heard, why the prayer of the complaint should not be granted.

Upon the plaintiff giving a written undertaking, without surety, to the effect that the plaintiff will pay to the parties enjoined such damages, not exceeding the sum of five hundred dollars, as they may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto; it is ordered that pending the return to the said rule, all depositors and creditors of Central Union [fol. 14] Bank of South Carolina are restrained from proceeding against the said Bank, its officers, stockholders, or its assets in any way except in this action and the defendants in this action are also restrained from proceeding in any court, in any way, in connection with the affairs and assets of the Central Union Bank except in this proceeding.

W. H. Townsend, Judge Fifth Circuit.

April 11, 1933.

[fol. 15] In Court of Common Pleas of Richland County

[Title omitted]

Complaint

The plaintiff complaining of the defendants, alleges:

1. That plaintiff is now, and was at the time the Central Union Bank of South Carolina closed for business, at the end of the business day of March 4, 1933, a depositor in said Bank; and he brings this action in behalf of himself and all other creditors and depositors of said Bank.

2. That the plaintiff and the defendants named herein are residents of Richland County, State of South Carolina; the Honorable Ibra C. Blackwood is Governor of the State of South Carolina; the Honorable Julian Scarborough is Treasurer of said State; and a member of the South Carolina Board of Bank Control, being made a party to this suit representing himself and the other members of this

[fol. 16] Board; on information and belief, that Simpson J. Zimmerman is a depositor in the Central Union Bank of South Carolina, and was an officer and employee thereof prior to March 4, 1933, and has been appointed Conservator of the Central Union Bank of South Carolina by the Governor of South Carolina and the State Board of Bank Control, and Albert S. Fant is Bank Examiner of the State of South Carolina.

3. That the Central Union Bank of South Carolina is a banking corporation with its principal place of business in Richland County, State of South Carolina, with branch offices in Rock Hill, S. C., and Greenwood, S. C., and perhaps in other places. That this Bank suspended its regular banking functions on or about the close of business hours on the 4th day of March, 1933, and since that time, as this plaintiff is informed and believes, has paid out nothing to its depositors and has failed and refused to pay anything to the depositors on account of the deposits in it which were existing on or before March 4, 1933.

4. That the defendants other than the Conservator, the Governor and the members of the South Carolina Board of Bank Control, are, as this plaintiff is informed and believes, depositors, secured or unsecured, of the Central Union Bank of South Carolina, and are made parties to this suit representing themselves and all other depositors and creditors of the bank.

5. That since the appointment of the Conservator for the Central Union Bank, the bank has been receiving special trust accounts and exercising limited banking functions in receiving these deposits and paying out moneys on these deposits, but on information and belief, that the expenses of these operations are not being borne by the special trust account themselves, but are a portion of the overhead of the business which is being charged against the assets of the bank, which assets should be preserved for the depositors [fol. 17] who were in existence on March 4, 1933, and that the conduct of the Conservator in operating his trust accounts results in a depletion of the assets which should otherwise be applied to the liquidation of the amounts due to the depositors and creditors of the Bank.

6. That pursuant to an Act of March 9, 1933, a Board of Bank Control has been appointed by the Governor of the State of South Carolina, including among its members the Honorable Julian Scarborough, who is made a party to this action representing himself and all members of said Board. That the Governor and the Board, pursuant to the authority of this Act, have appointed Simpson J. Zimmerman as Conservator for this Bank for an indefinite period of time. That the depositors of the Bank under the terms of this Act are prevented from bringing any action against the Bank itself without the approval of the Governor. That the plaintiff herein has asked the Governor for authority to bring action against the Bank for the purpose of determining its solvency and for providing for its orderly liquidation, but said request has to date been refused by the Governor of the State.

7. That this plaintiff has also requested the Governor to allow him access to the last records giving the true condition of the Central Union Bank, but he has been refused access to these records or information which would lead him to reach a conclusion as to the chances of a reorganization of the Bank, as to the chances of reopening the Bank, or as to whether the affairs of the bank are in such condition as to require the liquidation of its assets.

8. Further, on information and belief, a considerable amount of the stock of said Bank is held in the name of certain dummy or holding corporations contrary to the laws of this State and for the purpose of enabling certain officers of said Bank to hold their positions, draw their salaries [fol. 18] and escape the regular stockholders' liability to depositors as provided by our Constitution and laws.

9. That this plaintiff alleges, on information and belief, that there is practically no chance of reopening of the Bank or of its reorganiz-tion, and that its property and assets should be liquidated by and under the orders of the Court and applied to the payment of its debts to depositors and creditors.

10. That pursuant to the terms of the aforesaid Act, the Honorable Albert S. Fant, State Bank Examiner, has been

restrained from taking charge of the Bank and from calling in the depositors and creditors for the purpose of liquidation procedure as is usual in the case of insolvent banks.

11. As plaintiff is advised and believes, said Act of the General Assembly of South Carolina and acts and rulings of the Board of Bank Control, are unconstitutional, null and void. They enable the said Conservator to take charge and possession of the property and assets of said Bank, including the property and deposit of this plaintiff, without an opportunity to the plaintiff to be heard, and enable said Conservator to continue the business of the Bank at the expense and risk to the property of the plaintiff and other depositors, and deprive the plaintiff and like depositors of their property, of their contractual rights under the Constitution and laws of the State to forthwith enforce the liability of stockholders.

12. That there is danger of depositors bringing various individual actions in connection with the assets of this bank which are likely to result in serious loss to the rights of the general depositors therein.

13. On information and belief, that certain of the secured depositors or creditors of the bank, pursuant to their rights under the security or collateral agreements, intend to sell [fol. 19] their collateral and realize on the proceeds thereof, which is likely to result in substantial losses to the unsecured depositors and creditors of the bank.

14. On information, advise and belief, that the aforesaid Act and the statute laws of the State of South Carolina in regard to the liquidation of banks do not deprive this Court of its general equity jurisdiction to take over the affairs of an insolvent banking corporation or a banking corporation which has suspended business, and is in danger of insolvency; and this plaintiff alleges, on information and belief, that the Central Union Bank of South Carolina is insolvent.

15. That in order to properly protect the interests of the depositors and creditors of the Central Union Bank, particularly the unsecured depositors and creditors, this Court in the exercise of its general equity jurisdiction, should investigate into the condition of the affairs of the

bank, restrain depositors from proceeding against the bank or against the assets of the bank, except in this action; should require the Governor of the State of South Carolina, The South Carolina Board of Bank Control and the Conservator of the Central Union Bank to come into this action and make a showing as to the true condition of the bank; should conserve and preserve the assets and property of said bank, for its rightful creditors and depositors.

16. That plaintiff has no adequate remedy except in this Court.

Wherefore this plaintiff prays:

1. That a rule to show cause be issued, directed to the defendants, requiring them to show cause at such time as the Court may see fit why the prayer of the complaint should not be granted.

2. That all depositors and creditors of the Central Union Bank of South Carolina be restrained from proceeding in [fol. 20] any way against the Bank, its officers, stockholders, employees or its assets, except in this action.

3. That the Conservator, the Governor of the State of South Carolina and the South Carolina Board of Bank Control be required to show in this action the true condition of the affairs of the Bank; and that plaintiff be allowed full access to the Bank Examiner's records, data and reports on and of said Bank.

4. That the Act of the General Assembly of South Carolina passed on March 9, 1933, creating a State Bank Board, restraining actions by depositors, except by consent of the Governor, providing for conservators for banks and for other purposes, be declared invalid, null and void, in so far as the same undertakes to prevent plaintiff and other depositors of the Central Union Bank from bringing and prosecuting this action.

5. That the Court take such steps and issue such orders from time to time, as it may deem proper to preserve the properties and assets of the said bank during the pendency of this action and until the further orders of the Court.

6. That pending the return to the Rule to Show Cause, a restraining order be issued preventing the defendants

and all depositors and creditors of the Bank from proceeding, except as herein set out.

7. For a Receiver to take charge of the property and assets of said Bank.

8. For the enforcement and collection in this action of the stockholders' liability under the Constitution and laws of this State for the use and benefit of the plaintiff and all other depositors.

9. And for such other and further relief as plaintiff may be entitled to in the premises.

D. W. Robinson, Attorney for Plaintiff.

April 11, 1933.

[fol. 21] *Duly sworn to by Hunter A. Gibbes. Jurat omitted in printing.*

A bill to authorize and direct the Governor of the State of South Carolina to assume plenary control of the State Banking Department and of all banks, banking institutions, building and loan associations, cash depositories, or other institutions doing a banking business of whatever nature, and to make, issue and promulgate such rules, regulations and/or instructions as may be necessary to direct, control and protect such banks, banking institutions, building and loan associations and cash depositories and depositors and to provide penalties for violation of such rules and regulations, and to regulate litigation in reference thereto, and to authorize the establishment or incorporation of a State Clearing House Association if necessary.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. From and after the passage of this Act the Governor of the State of South Carolina is hereby vested [fol. 22] with plenary powers to assume supervision and control of the Banking Department and the banks of the State of South Carolina, depositories, Building and Loan Associations, and all other institutions that accept and pay deposits, subject to the provisions of this Act.

Section 2. The Governor in his discretion and whenever in his judgment circumstances warrant it is empowered to:

"(a) Authorize, permit or direct and require, individually or collectively all banking corporations, Building and Loan Associations, cash depositories and all others doing a banking business within the State of South Carolina, under his supervision, to extend for such period and upon such terms as he deems necessary and expedient, payment of any demand and/or time deposits, such period and terms to be separately governed by the condition of each bank or other banking institution."

"(b) Permit, upon such terms as he may deem advisable, the issuance of clearing house certificates or other evidence of claims against assets of such banking corporations, Building and Loan Associations, cash depositories and all others doing a banking business within the State of South Carolina which agree thereto."

"(c) Authorize and direct the creation in such banking institutions, Building and Loan Associations, cash depositories and all others doing a banking business within the State of South Carolina of special trust accounts for the receipt of any deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in their respective correspondent banks as similar special trust accounts or invested as the governor may permit."

"(d) Promulgate for such banks, banking institutions, Building and Loan Associations and cash depositories such regulations as are necessary in his discretion to enable such [fol. 23] banks, banking institutions, Building and Loan Associations and cash depositories to comply fully with the Federal regulations prescribed for state and/or national banks."

"(e) To look into and determine whether or not the overhead expense of any institution embraced within the terms of this Act exceed the net income of said institution and in case such conditions are found to exist, he is hereby authorized and required to reduce such overhead expenses as his judgment may direct or proceed to order liquidation of such institutions as he may deem best for the interest of depositors."

"(f) Set up and establish, if advisable, a State Clearing House Association, under such rules and regulations as may be proper for such purpose, taking such securities as may be approved for such purpose, and empowering such State Clearing House Association to issue against such security or securities certificates of such denominations as may be necessary to facilitate exchange of a statewide nature: Provided, that such State Clearing House Certificates may be issued to the State of South Carolina and/or any political sub-division thereof on such proper security as may be deposited for such purpose, to be approved by the Governor, or the State Board of Control herein authorized to be established. In lieu of a State Clearing House Association, the Governor shall have power and authority to permit the incorporation of a State Clearing House Association whose capital stock shall be owned by such Banks, Banking Institutions, Building and Loan Associations and Cash Depositories, as may subscribe thereto, under such rules and regulations as he may deem proper for such purpose, which corporation shall be permitted to issue against adequate securities to be determined by the Governor certificates of such denomination as may be necessary to facilitate exchange of a State-wide nature, Provided, that such corporation may issue certificates to the [fol. 24] State of South Carolina, and/or any political subdivision thereof, on such proper securities as may be deposited for such purpose, to be approved by the Governor. Provided, further, That the number of directors of such corporation shall not exceed twenty nor be less than ten; that certificates issued under this sub-division shall be received at their face value in payment of taxes or other dues to the State of South Carolina or to any political subdivision thereof, and in payment of debts to any corporation chartered by the State of South Carolina. Such certificates shall not be subject to any stamp taxes by the State of South Carolina or any political subdivision thereof."

Section 3. The Governor is hereby authorized, empowered and directed to make all necessary rules and regulations and to give all instructions with respect to banks, banking institutions, building and loan associations and cash depositories which he may authorize, permit and/or direct and required to be conducted under the provisions of this Act. And it shall be the duty of all such banks, bank-

ing institutions, building and loan associations and cash depositories and their officers, agents and employees to comply fully with any and all such rules, regulations and instructions established and promulgated by the Governor with respect to such banks, banking institutions, building and loan associations and cash depositories under the terms of this Act; and such orders, rules and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the present banking laws.

Section 4. The State Bank Examiner is hereby prohibited, during the period while this Act shall remain in force, unless first authorized to do so by the Governor, from taking possession of any bank, banking institution, building and loan association or cash depository under his su- [fol. 25] pervision, either under resolution of its directors or through legal proceedings for failure to meet its liabilities while such bank, banking institution, building and loan association or cash depository shall be operated under the terms of this Act and the said bank examiner is hereby relieved from any and all liabilities for permitting such banks, building and loan associations or cash depositories to continue operation in accordance herewith. And all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, banking institutions, building and loan associations or cash depositories under the provisions of this Act, from instituting any legal proceedings of any nature whatever against any bank, banking institution, building and loan association or cash depository, without first obtaining the written approval of the Governor. Provided, This provision shall not apply to actions already commenced or hereafter to be commenced against or in connection with any banking institution under liquidation by receivers appointed prior to March 1, 1933. Provided, further, That the provisions of this Act shall not apply to banks now in the hands of the State Bank Examiner for the purpose of liquidation or reorganization.

Section 5. Nothing herein contained shall in any wise change the present satus of collateral pledged to secure any deposit account.

Section 6. All scrip or other evidence of indebtedness issued by any bank, building and loan association, cash

depository or other banking institution hereafter shall be issued only upon approval by the Governor.

Section 7. The Governor is hereby specifically authorized and empowered, in his discretion, to appoint a board of bank control to advise and consult with him and to vest them with such power and authority as he deems necessary to carry out the provisions of this Act.

[fol. 26] Section 8. Any violation of the provisions of this Act or any of the duly promulgated rules or regulations issued under the authority of this Act shall be punishable by fine not exceeding Five Thousand ($5,000.00) Dollars or imprisonment not exceeding two (2) years.

Section 8-A. The State of South Carolina shall incur no obligation or liability in connection with the operation of the provisions of this Act.

Section 8-B. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provisions otherwise shall not be affected thereby.

Section 9. All Acts or parts of Acts inconsistent with this Act are hereby suspended to the extent of such inconsistency while this Act is in effect.

Section 9-A. All stockholders of institutions within the purview of this Act are hereby prohibited from transferring, selling or otherwise disposing of stock in said institutions.

Section 10. This Act shall take effect immediately upon its approval by the Governor. Provided, however, That the authority and powers granted by this Act shall cease and determine eighteen (18) months from the date of the approval hereof, unless continued by the General Assembly of this State.

Approved by the Governor the 9th day of March, 1933.

The following resolution was offered by Mr. R. E. Henry, duly seconded by Mr. Burnet R. Maybank, and passed:

That the following order providing for the appointment of Conservators for certain State Banks and Cash Deposi-

tories in the State of South Carolina be, and the same is hereby adopted:

[fol. 27] "(1) Whenever the Governor of the State of South Carolina, upon the advice of the Board of Bank Control shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Governor may appoint one or more conservators for such bank and require of him such bond and security as the Governor deems proper. The conservator or conservators, under the direction of the Governor, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator or conservators shall have all the rights, powers and privileges now possessed by or hereafter given Receivers of insolvent state banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject.

During the time that such conservator or conservators remain in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this order, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this act or otherwise. The conservator or conservators shall receive as salary an amount to be hereafter fixed by the Governor upon the advice of the Board of Bank Control.

(2) The Governor shall cause to be made such examination of the affairs of such banks as shall be necessary to inform him as to the financial condition of such bank, and the examiner shall make a report thereon to the Governor at the earliest possible date.

[fol. 28] If the Governor becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transactions of its business subject to such terms, conditions, restrictions and limitations as he may prescribe.

While such bank is in the hands of the conservator or conservators appointed by the Governor, the Governor may require the conservator or conservators to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the Governor may safely be used for this purpose; and the Governor may, in his discretion, permit the conservator or conservators to receive deposits, but deposits received while the bank is in the hand of the conservator or conservators shall not be subject to any limitations as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator or conservators were appointed for it, or any subsequent indebtedness incurred for the purposes of liquidating any indebtedness of such bank existing at the time such conservator or conservators were appointed. Such deposits received while the bank is in the hands of the conservator or conservators shall be kept on hand in cash, or deposited with a Federal Reserve Bank.

Rules for Reorganizing

(3) In any reorganization of any bank under a plan of a kind which, under existing law, required the consent as the case may be, (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Governor shall be satisfied that the plan of reorganization is fair and equitable as [fol. 29] to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (a) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown in the books of the bank of (b) stockholders owing at least two-thirds of its outstanding capital stock as shown by the books of the bank or (c) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstand-

ing capital stock as shown by the books of the bank, shall have consented in writing to the plan or reorganization: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75 per cent thereof as above provided.

When such reorganization becomes effective all books, records and assets of the bank shall be disposed of in accordance with provisions of the plan and the affairs of the bank shall be conducted by its Board of Directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Governor. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan or reorganization.

[fol. 30] Notice of Reopening

(4) After fifteen days after the affairs of a bank shall have been been turned back to its Board of Directors by the conservator or conservators, either with or without a reorganization as provided in Section 3 hereof, the provisions of Section 2 of this order with respect to the segregation of deposits received while it is in the hands of the conservator or conservators and with respect to the use of such deposits to liquidate indebtedness of such bank shall no longer be effective: Provided, That before the conservator or conservators shall turn back the affairs of the bank to its Board of Directors he or they shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Governor published in the state in which the bank is located, a notice in form approved by the Governor, stating the date on which the affairs of the bank will be returned to its Board of Directors and that the said provisions of Section 2 will not be effective after fifteen days after such date; and on the date of the publication of

such notice the conservator or conservators shall immediately send to every person who is a depositor in such bank under Section 2 a copy of such notice by registered mail addressed to the last known address of such person as shown by the records of the bank, and the conservator or conservators shall send similar notice in like manner to every person making deposit in such bank under Section 2 after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors.

(5) The Governor, upon the advice of the Board of Bank Control, will hereafter prescribe such further rules and regulations as he may deem necessary in order to carry out the provisions of this order.

[fol. 31] Given under the hand and seal of the Governor, under the authority and in pursuance of an Act of the Legislature of the State of South Carolina, approved March 9, 1933."

[fol. 32] In Supreme Court of South Carolina

[Title omitted]

Return to Alternative Writ of Prohibition

To the Hon. the Supreme Court:

By way of Return to the order to show cause issued in the above entitled proceeding, dated 12 April 1933, the undersigned respondent respectfully shows:

Section 15, Article V of the State Constitution, providing that the Courts of Common Pleas shall have jurisdiction in all civil cases, and original jurisdiction to issue writs of injunction, subject to appeal to the Supreme Court; and Section 15, Article I, providing that all Courts shall be public and every person shall have speedy remedy therein for wrongs sustained; I made the order to show cause based upon the complaint, both of which are correctly set forth in the petition for the writ; the restraining order being intended to preserve and maintain the jurisdiction [fol. 33] of the State Court in the administration of the affairs of the bank, in the event that the plaintiff should establish a good cause of action.

The Supreme Court now has before it the same information and knowledge that the Court of Common Pleas and the Circuit Judge had at the time of the issuance of said order; and neither the Court of Common Pleas nor said judge have any knowledge or information as to the merits of said cause, except as set out in the verified complaint, and no interest whatever therein, and will be pleased, because of the interests of a great number of citizens involved, to have this Court assume jurisdiction in the emergency existing, in order that a speedy and final decision may be had thereon.

Respectfully submitted.

W. H. Townsend, Resident Judge of the Fifth Circuit.

[fols. 34 & 34½] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

DEMURRER AND MOTION TO DISMISS

The respondents herein, without waiving but expressly reserving all their rights to file a return and answer herein, respectfully demur to the petition herein upon the ground that said petition does not state facts sufficient to constitute a cause of action of any kind and does not entitle the petitioners to any relief at the hands of this Court.

And for the same reasons, the respondents respectfully move the Court to dismiss the petition.

D. W. Robinson, Attorney for Respondents.

April 14th, 1933.

[fol. 35] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

RETURN AND ANSWER OF HUNTER A. GIBBES

Hunter A. Gibbes, representing himself and all other depositors similarly situated, one of the respondents in the above entitled action, would make this return and answer to the petition herein, and by way of return and answer would respectfully show to this Court:

1. He denies all of the allegations of said petition except in so far as the same are admitted, explained or set forth hereinafter; and further answering said petition:

2. This respondent admits the allegations of paragraphs 1, 2, 3 and 4, except that he does not admit the allegations of said paragraphs as to the validity, force and effect of said banking Act.

3. In answer to the allegations of paragraph 5; he avers that said action heretofore instituted by him conflicts with the banking Act passed and approved by the General As- [fol. 36] sembly of the State of South Carolina on March 9, 1933 as the said Act is being interpreted and administered by petitioners, in so far as it:

(a) Authorizes the taking and using of the property of the respondent and other depositors and creditors of said Bank without notice to, consent, or an opportunity to consent to such taking, by said creditors and depositors. In this respect the said Act and its interpretation are in violation of the provisions of the Constitution of this State prohibiting the taking of private property for private purposes at all, and for public purposes only after just compensation made or secured to be made; and is in violation of the provisions of the State and of the United States Constitution in the taking without due process or any process of law of the property and property rights of your respondent and other creditors and depositors in said Bank.

(b) Impairs the obligation of the contractual rights of the respondent and other depositors in said Bank, given and guaranteed to such depositors under the Constitution and laws of the State of South Carolina, conferring on and vesting in such depositors the right to claim and to enforce the stockholders' double liability in all banking corporations.

4. In answer to the allegations of paragraph 6, your respondent avers that he is not sufficiently informed as to the purpose of the passage of said banking Act therein referred to, but if the purpose was by said Act, or by the administration thereof, to take from the respondent and other creditors and depositors their rights under the Constitution and laws of the United States and of this State,

after such rights were vested and fixed, then the said Act is null and void and cannot be and should not be enforced or upheld.

[fol. 37] This respondent specifically denies that his action was or is beyond the jurisdiction of said Court of Common Pleas for Richmond County.

5. In answer to the allegations of paragraph 7, denies that the institution and pendency of the suit by respondent will injure the public in any way. Denies that it will injure the petitioners except in so far as it may interfere with the salary or compensation of one of the petitioners, allegedly appointed Conservator by the Governor of the State. On the contrary, your respondent verily believes that said action will result in great benefit to the public generally, including the depositors in this bank and the depositors in many other banks. It will assure depositors of their right to confidently rely on the double liability of stockholders as security for their deposits. Denies that the said suit will prevent the petitioners from administering and enforcing the law under, and in subordination to the Constitution and statutes of this State and in co-ordinance with the vested rights of the creditors and depositors, the real owners of said bank.

6. In answer to the allegations of paragraph 8, your respondent has no knowledge or information sufficient to form a belief as to what audit or investigation is being made by the petitoners; but he does aver, on information, advice and belief, that during a banking holiday or moratorium which was recently declared by the Governor of this State, said Banking Board was charged with the duty of ascertaining whether or not this bank was solvent and should be permitted to open. It had in its possession, as it has now, the data and reports made to the State Bank Examiner from time to time by his employees, information which respnodent has not had access to, and when it declined to permit said bank to reopen in the ordinary and [fol. 38] regular course of business, and placed the same in the hands of a Conservator, a Receiver for some purposes, it found that said bank should not be opened in and for the regular course of business and the general public thereby had notiec that they should not deposit their funds there except in the restricted manner provided in the Act.

Further, said State Banking Board, by their own acts, practically told the public (and should in their petition herein have told this Court) that said bank was not solvent, could not meet its obligations to its depositors and creditors and should be wound up and liquidated.

7. Respondent denies the allegations of paragraphs 9 and 10.

8. In answer to the allegations of paragraph 11, admit that the said suit commenced by this respondent is a matter of great public importance and that it involves the constitutionality of the said banking Act as it is now being interpreted by the said State Banking Board, and as shown in and by the proceedings herein. The act and its proper construction are of great importance and, as your respondent verily believes, can be most beneficially used and administered according to law and in co-ordination with the rights of this respondent, as well as of other depositors similarly situated all over the State in reference to this and many other banks.

For a further answer and defense:

9. That the petitioners herein were and are charged with the duty of knowing whether or not said Bank was insolvent before the time fixed by the orders and proclamation of the Governor for the reopening thereof, which has passed some [fol. 39] time since. If it was solvent, it should have been permitted to reopen and a refusal to allow it to reopen was a gross injustice to the bank, to its stockholders, depositors and creditors. If it was not proper to reopen, then it should have been and should be administered and wound up in the most expeditious and economical manner possible.

10. Under the act of March 9, 1933, and the administration thereof by the petitioners, said Bank, without notice to or knowledge of the respondent or any other depositor, was placed in the hands of the petitioner, Simpson J. Zimmerman, under the name of Conservator. He was authorized to and is engaged now in conducting a regular banking business, receiving deposits on accounts which are termed trust accounts, and agreeing to pay the checks drawn thereon. He is exercising all the rights and duties of a bank except that of lending out money, generally the principal source of income of a bank. He is incurring large expenses for cleri-

cal help, is maintaining a large building and sundry other real estate, the maintenance of which necessarily incurs large expenditures, and all of this with no source of income other than exchange on checks, and rents of an office building against which is to be charged the operating expenses, unless this banking business is superimposed upon and is being supported and maintained by the assets of the bank as it existed at the time it closed, March 4, 1933.

If the said bank is being maintained and operated on the said assets as they existed March 4, 1933, then your respondent avers that it is clearly an invasion of his and all other depositors' legal rights to have the property taken over as of the date when the bank closed, and its assets and property liquidated and administered solely for the pay- [fol. 40] ment of the claims of the creditors and depositors who are its real owners.

11. On information, advice and belief, that the appointment, duties and responsibilities of a Receiver are materially better and more advantageous for depositors and creditors than a Conservator under the provisions of the Act of 1933 as interpreted by the petitioners herein. Under the laws of this State, the Court can appoint as Receiver only a person who is disinterested; neither an officer or creditor of the insolvent institution. As interpreted by the petitioners in the case at bar, they have appointed as Conservator and put in possession and charge of all the assets and property of the bank, a man who was, up to the time of the bank becoming insolvent, an officer thereof, and by his petition herein, admittedly a depositor and creditor, and also a stockholder. The depositors and creditors have, and have had, no voice in the appointment of the Conservator.

Under the laws of this State, the stockholders, depositors and creditors have a right to an opportunity to be heard and have a voice in the selection of the Receiver. A Receiver is appointed by a reputable and responsible Judge and his administration and liquidation of the Bank is under the supervision of and amenable to the orders of the Court and he is required to report to the Court. The compensation of the Receiver is fixed and limited by recent statute laws in this State and is always subject to the control of the Court not exceeding the amount fixed in the statute.

The compensation of the Conservator is not fixed by statute and there is nothing in the petition in this case to advise the Court as to whether or not, and if so, what agreement in regard thereto has been made between the State Banking [fol. 41] Board and the Conservator, who is one of the petitioners in this case.

A Receiver is required to give a good bond in the amount fixed by the Court. So far as the petition in this case discloses, no bond has been required or fixed for the Conservator, but respondent is advised that the Conservator has given a surety bond for his own conduct for which he has paid a premium of Five Hundred ($500.00) Dollars, supposedly out of the assets of the closed bank. But respondent has no information as to any bond by any other employee and there are a number of employees under the Conservator handling the property and assets of the closed bank.

There are a number of other differences which might be drawn, all likely to arise in the difference between the appointment of a Receiver by a reputable judiciary, and the appointment of a Conservator by political executives.

12. Respondent would further respectfully call the Court's attention to the fact that the petitioners, with the fullest knowledge in their own possession as to the real status of the banking corporation, knowledge which is of great importance to this Court in this case, nowhere in their petition, so far as respondent can find, disclose that knowledge to this Court, but on the contrary are withholding this information, as it has been heretofore withheld from respondent, while they seek at the hands of the Court the exercise of one of its most drastic prerogative writs.

13. Respondent would further allege that he is and has been at all times ready and willing to have the Courts of this country pass upon the validity, force and construction of the banking act of March 9, 1933, and that he is ready to have the hearing speeded to the utmost limit to the end that [fols. 42 & 42½] the case may be heard by the Circuit Judge, passed on and carried by appeal, if deemed necessary, to this Court, for that purpose waiving practically all time requirements and allowing this Court itself to fix all requirements for a speedy appeal so that the vital questions

may be passed on either by this Court itself, or by calling to its assistance the Court en banc, if it deems proper.

Wherefore, having fully answered, the respondent asks that this action be dismissed and for costs and other and further relief.

(Sd.) D. W. Robinson, Attorney for the Respondent, Hunter A. Gibbes.

April 14, 1933.

Duly sworn to by Hunter A. Gibbes. Jurat omitted in printing.

[fol. 43] In Supreme Court of South Carolina

Case No. 483

State of South Carolina ex Relatione Simpson J. Zimmerman, Individually and as Conservator of the Central Union Bank of South Carolina; Ibra C. Blackwood, Governor of the State of South Carolina, and Julian Scarborough, as a Member of and Representing the South Carolina Board of Bank Control, Petitioners,

v.

Hunter A. Gibbes, Representing Himself and All Other Depositors Similarly Situated; Court of Common Pleas for Richland County, and the Honorable W. H. Townsend, Judge of the Fifth Judicial Circuit, Respondents

In the Original Jurisdiction

Writ of Prohibition Granted

John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General, and Irvine F. Belser, all of Columbia, for petitioners.

D. W. Robinson, of Columbia, for respondents.

Opinion No. 13638—Filed May 11, 1933

Stabler, J.:

At its 1933 session, the General Assembly passed an act, approved March 9th of that year, vesting the Governor of

the State "with plenary powers to assume supervision and control of the banking department and the banks of the State of South Carolina, depositories, building and loan associations, and all other institutions that accept and pay deposits, subject to the provisions of this Act". Section 4, in part, provides:

"* * * And all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, banking institutions, building and loan associations or cash depositories under the provisions of this Act, from instituting any legal proceedings of any nature whatever against any bank, banking institution, building and loan association or cash depository, without first obtaining the written approval of the Governor. * * *"

Pursuant to the powers granted, the Governor appointed a board of bank control to advise and consult with him; and later, under authority of the act, Simpson J. Zimmerman was named as Conservator of the Central Union Bank of South Carolina, which has its principal place of business at Columbia.

On April 11, 1933, an action was begun in the Court of Common Pleas for Richland County by Hunter A. Gibbes, "representing himself and all other depositors similarly situated", against Zimmerman, individually and as Con- [fol. 44] servator of the Central Union Bank, the Governor of the State, and others. The plaintiff alleged, inter alia, on information and belief, that there was practically no chance of the reopening or the reorganization of the Central Union Bank; that its funds were being depleted by its present management; and that its assets should be liquidated by the orders of the Court and applied to the debts of its depositors and other creditors. The prayer, inter alia, was for the appointment of a receiver, for the enforcement of the stockholders' liability, and that the act of March 9, 1933, "be declared invalid, null and void, in so far as the same undertakes to prevent plaintiff and other depositors of the Central Union Bank from bringing and prosecuting this action".

Judge W. H. Townsend, to whom the matter was presented, issued a rule requiring the defendants to show cause before him on May 4, 1933, why the prayer of the complaint should not be granted, and by his order re-

strained the defendants in the meantime, "from proceeding in any Court, in any way, in connection with the affairs and assets of the Central Union Bank except in this proceeding".

On April 12, 1933, the present proceeding was instituted in the original jurisdiction of this Court, by the State of South Carolina, in relation to Zimmerman and other defendants named in the original suit, against Hunter A. Gibbes, plaintiff in that suit, the Court of Common Pleas for Richland County, and Hon. W. H. Townsend, Judge of the Fifth judicial circuit, seeking a writ of prohibition "restraining and enjoining them from further proceeding in the said case, and dissolving and dismissing the rule to show cause and temporary restraining order therein issued, and dismissing said suit". On the verified petition this Court granted an alternative writ of prohibition, requiring the respondents to show cause before it, on April 14, 1933, why the relief prayed for should not be granted, and why a final writ of prohibition should not issue. Judge Townsend made formal return, setting out that the Courts of Common Pleas, under the provisions of the State Constitution, have jurisdiction in all civil cases, and original jurisdiction to issue writs of injunction, subject to appeal to the Supreme Court; and that the Order to show cause made by him was based upon the complaint, and that the restraining order issued was intended to preserve and maintain the jurisdiction of the State Court in the administration of the affairs of the bank, in the event that the plaintiff established a good cause of action; and further stated that—

"The Supreme Court now has before it the same information and knowledge that the Court of Common Pleas and the Circuit Judge had at the time of the issuance of said order; and neither the Court of Common Pleas nor said Judge have any knowledge or information as to the merits of said cause, except as set out in the verified complaint, and no interest whatever therein, and will be pleased, because of the interest of a great number of citizens involved, to have this Court assume jurisdiction in the emergency existing, in order that a speedy and final decision may be had thereon."

The respondent, Hunter A. Gibbes, demurred upon the ground that the petition "does not state facts sufficient to

constitute a cause of action of any kind and does not entitle the petitioners to any relief at the hands of this *this* Court". He also made return and answer, setting forth at length his reasons why the writ should not issue, and praying for dismissal of the petition.

We think the matter may properly and correctly be disposed of by a decision of the questions: (1) Whether the writ of prohibition is here the appropriate remedy; and (2) whether the banking act of 1933 is constitutional with especial reference to that portion of section 4 forbidding the bringing of suits against the banks by any one without the written permission of the Governor. In our discussion of these questions, we shall necessarily refer to and dispose of the several contentions of the respondents.

[fol. 45] We desire, in the outset, to call attention to the very recent case of Ex parte Jones, 160 S. C. 63, 158 S. E. 134, where Hon. Mendel L. Smith, Acting Associate Justice, in an able and elaborate opinion, discusses the history and law of prohibition, citing most of the cases in this State dealing with the question. See also Ex parte Wingate, 166 S. C. 440, 165 S. E. 176, the latest utterance of this Court on the subject.

As the contention, that prohibiton is an extraordinary prerogative writ and should be resorted to only in cases of necessity and when there is no other adequate ordinary remedy, is conceded, a discussion of that point is unnecessary. See Ex parte Jones, supra; Ex parte Wingate, supra; Spelling on Extraordinary Remedies, Vol. 2, section 1727; High on Extraordinary Remedies, section 765. The rule is that where the Court in which the original action is brought has jurisdiction and the usual remedies provided by law are adequate and complete, the writ should not issue. The respondent Gibbes contends that this proceeding falls within that class, the petitioners, defendants in Common Pleas, having a full and adequate remedy by appeal. The question, however, whether the remedy is inadequate, is one within the sound discretion of the Court to which application is made for the issuance of the writ and is to be determined on the facts of each particular case. And in this connection the Court may properly consider the delay and inconvenience incident to appeal, although the inadequacy of such remedy will not be tested solely by these considerations. It is to be kept in mind that the

right of prohibition is defeated, not by the exercise, but by the adequacy, of the remedy by appeal. 50 C. J. 686.

In the case at bar we conclude, upon consideration of the facts before us, that the remedy accorded the petitioners by appeal is not, in the existing circumstances requiring a speedy disposition of the questions presented to which we shall more particularly hereafter refer, such a completely adequate remedy as would justify the Court in refusing the writ on that ground.

With regard to the contention that a prohibition proceeding is not the proper way of testing the constitutionality of the act, "it seems to be the rule that the Court will not determine constitutional questions in a prohibition proceeding if the same questions may be raised in another proceeding which will furnish the applicant an adequate remedy". 22 R. C. L. 25. But the appellate Court will not refuse to grant relief by prohibition simply because to do so would necessitate the passing upon a constitutional question. Bell v. Court (Nev.), 1 L. R. A. (N. S.) 843; 22 R. C. L. 25. As we have held in this case that a completely adequate remedy by appeal is not afforded the petitioners in the circumstances, the necessity for passing upon the constitutional questions raised would not bar relief by prohibition.

It is also urged that the writ should not issue for the reason that the attention of the inferior Court was not called to its alleged lack or excess of jurisdiction. While it has been held that this is a prerequisite where prohibition is sought, it is also held that the rule is nothing more than a "mere rule of courtesy, and not in any sense rigid". State of Wyoming ex rel. Poston v. District Court, 227 Pac. 378, 35 A. L. R. 1082, and note. And the question whether the objection was made in the Court below is immaterial where the lack of jurisdiction is apparent on the face of the original suit or where the Judge of the inferior Court appears in the prohibition proceeding and asserts his jurisdiction. Ex rel. Poston, supra; Oldroyd v. McRea, 235 Pac. 580, 40 A. L. R. 230; State v. Scott, 1 Bailey 294. It is evident that this contention is without merit.

II

We turn now to the question of the constitutionality of the act. It is well established that the banking business

[fol. 46] is affected with a public interest so as to be subject to legislative regulation and control as a part of the police power of the State (2 R. C. L. 379, 7 C. J. 480-481); and that the Legislature has authority to prescribe and limit the method and manner of enforcing depositors' rights against the banks and the stockholders thereof (Graham, Receiver v. Berry, 166 S. C. 277, 164 S. E. 755; Branchville Motor Company v. Addén, 158 S. C. 90, 155 S. E. 277; Fischer v. Chisholm, 159 S. C. 395, 157 S. E. 139; Ex parte Love, 158 S. C. 249, 155 S. E. 428).

In Witt, Receiver, v. Peoples State Bank, 166 S. C. 1, 164 S. E. 306, the Court said: "The regulation of banks and legislation as to insolvent banks are special matters peculiarly within the province of legislative action. 2 R. C. L. 379; 12 C. J. 116; 7 C. J. 10 and 480; Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 S. Ct. 186, 55 L. Ed. 142, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912 A 487."

For a very interesting discussion of this question, see Re Pittman, 31 Nev. 43, 99 P. 709; 22 L. R. A. (N. S.) 266. In that case the Court said:

"Indeed, it would be next to impossible to carry on the great business transactions of this country, which aggregate hundreds of billions of dollars annually, without the aid of a well-organized banking system. It needs no extended argument to establish the fact that the banking business is in a class by itself. The assertion of the fact should be sufficient."

And again:

"Common experience has abundantly demonstrated that the prosperity of the country is very largely influenced by public confidence in its banking institutions. Anything which tends to shake that confidence, and causes depositors in banks to withdraw their deposits, produces contraction in business which may result, and at times has resulted, in panics which have brought ruin and disaster to thousands, and seriously affected the welfare and happiness of the public generally for greater or less periods of time."

Also:

"To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is

not only clearly within the powers of the legislative department of government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."

The question, therefore, is, Was the Legislature justified, in view of the serious banking conditions prevailing throughout the State and generally, in the exercise of the police power of the State, in passing the banking act of 1933? It is contended that the portion of the act contained in section 4, which forbids the bringing of an action for any purpose against the banks by any one—which includes the depositors and stockholders—is unconstitutional, for the reasons that it deprives the respondent and other depositors of the bank of their property without due process of law, prevents their collection of the stockholders' liability guaranteed to them by the Constitution, and denies to them the right of a speedy remedy in the Courts for wrong sustained. To this question we have given serious thought.

It is evident that only under extraordinary and serious conditions, affecting the common good and general welfare, would the Legislature be justified in even temporarily suspending—as was done in this case—such rights; and, of course, this could be done, if at all, only under the police power, which is an attribute of sovereignty and necessary to the existence of government itself. The exercise of this power rests upon the maxim that one cannot use his own [fol. 47] property so as to injure the rights of others, and on that other well known maxim that the safety of the people is the supreme law. If the time comes in the life of any people when the common good and the general welfare demand it, the exercise and assumption of such power, through legislative action, is entirely justified. A police regulation, therefore, intended as such and not operating unreasonably beyond the occasion of its enactment, is not rendered void or invalid by the fact that it may incidentally affect some right guaranteed by the Constitution; it may not, however, unreasonably invade private rights or arbitrarily violate constitutional guaranties.

In order to sustain any legislation under the police power, the Courts must be able to see that its operation tends to preserve and insure the common good and general welfare;

and only in cases where the Legislature exceeds its powers, will the Courts interfere and set up their judgment against that of the lawmaking body. In short, the general rule is that the Legislature is primarily the judge as to what laws should be enacted for the protection and welfare of the State and its people; but, in the last analysis, the question of the validity of such measures so enacted is one for the Court.

We need not dwell here upon the serious conditions which prevailed in banking circles prior to and at the time of the passage of the 1933 act, and which still prevail, to a greater or less degree. These conditions are matters of common knowledge and existed, not only in this State, but throughout the nation. Even the solvent banks, because of general conditions, were unable to properly function. Many banking institutions were loaded with assets that could not be liquidated. Gold in large quantities was withdrawn for purposes of hoarding; lack of public confidence in the soundness of the banks caused the abnormal withdrawal of deposits; and a nightmare of uncertainty and panic threatened with disaster the business life of the country. It was only firm and timely action of the President of the United States and of the Governors of the several States which prevented the entire and immediate collapse of our financial system and the wrecking of our banking institutions everywhere. The causes that brought about these conditions are not here matters for consideration. We are concerned only with the undisputed existence of a serious emergency, imperatively requiring that something be done for the protection and safety of the public and for the common good; and the situation was of such nature as to require heroic action. It is evident that the Legislature, in its enactment of the 1933 law, intended to meet this emergency and thereby to provide a remedy and a method of administering banking affairs for the purpose of protecting, as far as possible, the property and rights of the public generally. Some of the banks were sound, but closed temporarily because of existing conditions; others, while not perhaps absolutely sound, were in such condition that they might by reorganization be made to function normally; while still others might be insolvent—and these being, in the circumstances, a menace to the whole system, required such special consideration and treatment as their peculiar conditions

might indicate, in order to obviate or lessen the general danger which they created. In such emergency we think the Legislature could and did properly exercise the police power of the State in the passage of the act.

It is also a matter of common knowledge that a great many banks are still unopened or functioning under restrictions. Which of these may be reorganized and which are hopelessly insolvent, are matters not yet finally determined. The Court fully appreciates the feelings of the many depositors in these institutions. In their honest desire, however, to obtain what they conceive to be rightly theirs, the depositors and others affected must not be allowed to so use their own property as to bring an irreparable calamity upon the general public. The appointment of receivers for any of these banks would have the effect of taking out of the hands of the Governor the administration of the affairs of such banks and placing them in the control of the courts, for liquidation. And if the appointment of receivers is sanctioned, doubtless many suits will be instituted for that purpose, which would result in chaos and confusion in the reorganization and rehabilitation of the banking system of the State, and thereby defeat the very purpose of the act.

[fol. 48] It is hardly necessary to repeat what we have already indicated, that the act was intended to be only a suspension of certain legal rights enjoyed by the citizen in normal times, and such suspension can exist so long only as the necessity for it appears.

The Writ of Prohibition will issue as prayed for.

And it is so ordered.

Carter and Bonham, JJ., concur. Blease, C. J., concurs in part and dissents in part.

IN SUPREME COURT OF SOUTH CAROLINA

OPINION

BLEASE, C. J. (concurring and dissenting):

While being in thorough accord with the holding in this Opinion to the effect that the Act in question is not violative of the Constitution of the State, I do not think prohibition properly lies, and with the conclusion announced in the Opinion as to that, I am not in agreement. The Court of

Common Pleas had proper jurisdiction of this cause, and, when a Court, inferior to this, is acting within its jurisdiction, a Writ of Prohibition should not be granted by this Court; and that is the Rule announced by previous decisions of this Court.

[fol. 49] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR APPEAL

To the Honorable Supreme Court of the State of South Carolina:

The above named Hunter A. Gibbes, respondent in the State Supreme Court, appellant here, representing himself and all other depositors of the Central Union Bank of South Carolina similarly situated, feeling himself aggrieved by the decision and decree rendered and entered in the above entitled cause on the 11th day of May, A. D., 1933, does hereby appeal from said Decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United [fol. 50] States, sitting at Washington, D. C., under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Your petitioner, appellant, herewith presents the Assignments of Error upon which he will rely in the prosecution of his appeal herein.

D. W. Robinson, Attorney for Appellant.

May 17, 1933.

[fol. 51] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL

On motion of D. W. Robinson, Esq., counsel for appellant, it is hereby ordered:

That an appeal to the Supreme Court of the United States from the decree and decision heretofore filed and entered by the Supreme Court of the State of South Carolina on the 11th day of May, 1933, be, and the same is hereby allowed, and that a certified transcript of the record, exhibits and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of One thousand ($1,000.00) Dollars.

It is further ordered that the time for the petitioner appellant to file and docket the appeal herein be extended [fol. 52] for thirty (30) days from this date.

(Sd.) Eugene S. Blease, Chief Justice.

May 18, 1933.

[fol. 53] In Supreme Court of South Carolina

[Title omitted]

Assignment of Errors

Now comes the Respondent, Hunter A. Gibbes, in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decision and decree of the Supreme Court of the State of South Carolina made on the 11th day of May, 1933:

I

That the Supreme Court of the State of South Carolina erred in sustaining the petition for and granting to the petitioners therein (appellees herein) the Writ of Prohibition and injunction, and in so doing upholding the validity and constitutionality of the Act of the General Assembly of the State of South Carolina approved March 9, 1933, entitled "A Bill to Authorize and Direct the Governor [fol. 54] of the State of South Carolina to Assume Plenary Control of the State Banking Department and of all Banks, Banking Institutions, Building & Loan Associations, Cash Depositories or Other Institutions Doing a Banking Business of Whatever Nature, and to Make, Issue and Promulgate Such Rules, Regulations and/or Instructions as May

be Necessary to Direct, Control and Protect Such Banks, Banking Institutions, Building & Loan Associations and Cash Depositories and Depositors and to Provide Penalties for Violation of Such Rules and Regulations, and to Regulate Litigation in Reference Thereto, and to Authorize the Establishment or Incorporation of a State Clearing House Association if Necessary", because the said Act as interpreted and administered by said Governor and as construed by the Supreme Court of the State of South Carolina in this case authorizes the arbitrary taking, withholding and use by the Governor of the property, including the deposit of the appellant and others in like condition, of said bank, through an appointee made by him without notice or an opportunity to said petitioner, appellant and/or other depositors and creditors to be heard, without compensation and without due process of law, or any process of law, in violation of the Constitution of the United States.

II

That the Supreme Court of the State of South Carolina erred in sustaining the petition for and granting to the Petitioners (appellees) the Writ of Prohibition and injunction herein, because the said Act of the General Assembly of the State of South Carolina as interpreted and administered, and as construed by the Supreme Court of South Carolina, impairs the obligation of the contractual rights of the petitioner, depositor, and other depositors and creditors in and of said Bank; and deprives said depositors and [fols. 55 & 55½] creditors of their property without due process of law; in that:

(a) Under the Constitution and laws of the State of South Carolina, the assets of an insolvent bank, the property of the depositors and creditors, are impressed with a trust for the use and benefit of such depositors and creditors; and under said Constitution and laws of the State of South Carolina the stockholders of a bank are liable to the depositors thereof in an amount additional and equal to the stock held by them in the bank, and these are vested, contractual property rights of depositors.

(b) By the said Act of the General Assembly of the State of South Carolina as interpreted and administered by the said Governor and as interpreted and construed by the said

decision of the Supreme Court of South Carolina, these property, contractual and/or vested rights of petitioner and other like depositors are impaired and taken without compensation and without due process, all in violation of the Constitution of the United States and amendment XIV thereof.

Wherefore the appellant prays that the said judgment and decree of the Supreme Court of the State of South Carolina be reversed.

D. W. Robinson, Attorney for Appellant.

May 17, 1933.

[fols. 56-60½] Bond on appeal for $1,000, approved May 20, 1933, omitted in printing.

[fols. 61-65] Citation in usual form, showing service on John M. Daniel et al., omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

DESIGNATION BY APPELLANT I. OF POINTS WHICH HE INTENDS TO RELY ON; II. OF THE PARTS OF THE RECORD WHICH HE THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed June 1, 1933

In accordance with the rules of this Honorable Court, the appellant, Hunter A. Gibbes hereby designates: (1) Points on which he intends to rely in prosecuting his appeal from the decision of the Supreme Court of the State of South Carolina; and (2) parts of the record deemed necessary for the consideration thereof, to-wit:

I

The jurisdiction of this the Supreme Court of the United States is invoked on the ground:

1. The Act of the General Assembly of the State of South Carolina passed and ratified on March 9, 1933, en-[fol. 67] titled "A Bill to Authorize and Direct the Gover-

nor of the State of South Carolina to Assume Plenary Control of the State Banking Department and of All Banks, Banking Institutions, Building and Loan Associations, Cash Depositories or Other Institutions Doing a Banking Business of Whatever Nature, and to Make, Issue and Promulgate Such Rules, Regulations and or Instructions as May be Necessary to Direct, Control and Protect Such Banks, Banking Institutions, Building and Loan Associations and Cash Depositories and Depositors and to Provide Penalties for Violation of such Rules and Regulations, and to Regulate Litigation in Reference Thereto, and to Authorize the Establishment or Incorporation of a State Clearing House Association if Necessary", as the said Act is construed and interpreted by the decision of the Supreme Court of the State of South Carolina, takes from the appellant, Hunter A. Gibbes, his property and property rights without compensation and without due process of law; and the said Act, as construed by said decision of the Supreme Court of the State of South Carolina, impairs the contractual rights of Hunter A. Gibbes, all in violation of the Constitution of the United States.

The jurisdiction of this the Supreme Court of the United States is invoked for the foregoing reasons under the provisions of Section 237 of the Judicial Code of the United States as amended. See U. S. C. A., Title 28, Sec. 344 (a) and (b).

Further Statement

As a further and fuller statement of the invalidity and unconstitutionality of the said law, the appellant would respectfully show:

1. That the appellant on and before March 4, 1933, was a depositor of The Central Union Bank of South Carolina, a [fol. 68] corporation engaged in general banking business, with its principal place of business in Richland County, State of South Carolina, with branches elsewhere. See complaint in original action in Court of Common Pleas for Richland County, State of South Carolina of Gibbes v. Zimmerman, etc., paragraphs 1 and 3.

2. That on the 4th day of March, 1933, the Bank suspended its business as a bank and has since paid out nothing to its depositors, and since that time has failed and

refused to pay anything to depositors, except deposits made since said date. See same Complaint, Pars. 1 and 3.

3. That subsequent thereto, on March 9, 1933, a law was duly enacted by the General Assembly of the State of South Carolina, entitled as hereinabove set out, the full text of which Act appears in and attached to the pleadings in State of South Carolina, Ex Relatione Simpson J. Zimmerman, et al., v. Hunter A. Gibbes, et al., in the Supreme Court of the State of South Carolina, and reference to the same is here made.

4. That pursuant to said law, the Governor of the State of South Carolina, arbitrarily and without any notice to appellant or other depositors or creditors of said bank, undertook to appoint Simpson J. Zimmerman, a stockholder, vice-president and director of said Bank, as its Conservator and to authorize him to take full charge, possession and control of said Bank, its assets and property, and since that time said Simpson J. Zimmerman, Conservator, has paid out nothing to the depositors, including appellant, and refuses to pay such depositors anything on account of any of the deposits in said bank existing on or before March 4, 1933; but the said Bank, under said Conservator, has been receiving funds in the nature of special trust accounts and exercising banking functions in receiving and paying out such deposits, the expense of such operation not being borne by the special trust accounts themselves, but a portion thereof being charged against the assets of the bank (including the said deposit of the appellant, Hunter A. Gibbes), which assets as they existed on March 4, 1933, should be preserved [fol. 69] and not depleted or impaired, and applied to the liquidation of the amounts due to the depositors and creditors, including the appellant. Same Complaint, pars. 3 and 5.

5. That under said Conservator and his management the Appellant is denied access to the records of the Bank, and of the State Bank Examiner and of the State Treasurer, which would show the true condition of the bank and its possibility of reopening, and the appellant is denied the right to bring any action to enforce his rights, or to protect and preserve the property and assets of said Bank for the

benefit of the depositors (including himself) and other creditors except with leave of the Governor, and the Governor has refused permission to bring such suit. Same Complaint, pars. 6 and 7.

6. That the Bank is insolvent and there is no chance except from liquidation through the courts for the depositors and other creditors to obtain payment of their deposits and debts. Same Complaint, pars. 9, 10, and 14.

7. Further, that in and by the Constitution and the statutes of the State of South Carolina, the stockholders of an insolvent Bank are made individually liable in an amount additional and equal to the par face value of their respective holdings of stock in such bank to the depositors of any such bank. Constitution of S. C., Art. IX, § 18; Code of Laws of South Carolina, Vol. III, § 7868. This liability is contractual in its nature, the stockholder making the subscription in contemplation of the applicable law. Fischer v. Chisholm, 159 S. C. 395, 398, 157 S. E. 139. The only method for collecting and enforcing this liability of the stockholders is through a receiver appointed by a Court of Equity to liquidate and administer the assets of such a bank. Code of Laws of S. C., 1932, Vol. III, Sec. 7856; Branchville Motor Co. v. Addeu, 158 S. C. 90, 94, 6, 155 S. E. 277 (2, 3).

[fol. 70] By the Act of March 9, 1933, as construed and interpreted by the Supreme Court of the State of South Carolina in the case, from which this appeal is taken, this contractual right, and the remedy to enforce the same, of the appellant and other like depositors is impaired and taken.

8. That other creditors of the Bank hold considerable securities of the bank with valuable collaterals and are apt to use the same to the sacrifice of the same and to the injury of the other creditors and depositors, including appellant, and there is no adequate remedy except in an action of this kind, calling in all depositors and creditors, enjoining other suits and administering and liquidating the assets of the bank.

9. Upon the institution of the action in the Court of Common Pleas for Richland County, State of South Carolina, by the appellant to enforce and protect the rights of him-

self and other depositors of said bank, the defendants therein filed a petition in the original jurisdiction of the Supreme Court of the State of South Carolina for the purpose of obtaining a writ of prohibition and injunction against the proceeding in the Court of Common Pleas, and the said Court on the hearing thereof rendered a final decision and judgment on May 14, 1933, from which this appeal is taken, granting the writ of prohibition and injunction, holding the said Act of the General Assembly of South Carolina valid and enjoining the appellant from claiming or enforcing any rights against the said bank, and its said Conservator, as will more fully appear on reference to the opinion and judgment in said case, herein set forth in full.

10. In that case, Hunter A. Gibbes, representing himself and all other depositors of the Bank, filed a demurrer and a motion to dismiss and also filed a return and answer, and in and by said return and answer, paragraph 3 (a), (b), directly questions the validity of the said Banking Act of the [fol. 71] State of South Carolina upon the grounds that said Act as administered by the petitioner and the Banking Board of South Carolina, and as contended for by the petitioners in the said proceeding for writ of prohibition in the original jurisdiction of the Supreme Court of the State of South Carolina (and as determined by the decision of the Supreme Court of the State of South Carolina) is contrary to the Constitution of the United States and is null and void, in that it:

(a) Authorizes the taking and use of the property of the appellant and other depositors and creditors of said Bank without notice, consent, compensation or due process of law;

(b) Takes and impairs the obligation of the contractual rights of the appellant and other like depositors in said bank to proceed against the liability of the stockholders.

All in violation of the rights of the appellant guaranteed and protected by the Constitution of the United States. See Return and Answer of Hunter A. Gibbes in the case in the original jurisdiction of the Supreme Court of South Carolina, paragraph 3, (a) and (b).

II

The appellant further designates the following parts of the record which he thinks necessary for the consideration of the appeal herein, to wit:

1. The petition and pleadings on application for Writ of prohibition in the original jurisdiction of the Supreme Court of the State of South Carolina, together with the alternative writ of prohibition, together with the exhibits thereto attached, consisting of the Rule to Show Cause issued by W. H. Townsend, Judge of the Fifth Judicial Circuit on April 11, 1933, in the case of Hunter A. Gibbes, representing himself and all other depositors similarly situated, against Simpson J. Zimmerman, individually and as [fol. 72] Conservator of Central Union Bank, Hon. Ibra C. Blackwood, Governor of the State of South Carolina, Hon. Julian Searborough, as a member of and representing the South Carolina Board of Bank Control, Albert S. Faut, State Bank Examiner; Richland County, South Carolina; the City of Columbia, and John Doe, defendants; the complaint in the Court of Common Pleas for Richland County, State of South Carolina, in the same case, and the Act of the General Assembly of the State of South Carolina, attached thereto, enacted March 9, 1933, entitled: "A Bill To Authorize and Direct the Governor of the State of South Carolina to Assume Plenary Control of the State Banking Department and of All Banks, Banking Institutions, Building and Loan Associations, Cash Depositories or Other Institutions Doing a Banking Business of Whatever Nature, and to Make, Issue and Promulgate Such Rules, Regulations and/or Instructions as May be Necessary to Direct, Control and Protect Such Banks, Banking Institutions, Building and Loan Associations and Cash Depositories and Depositors and to Provide Penalties for Violation of Such Rules and Regulations, and to Regulate Litigation in Reference Thereto, and to Authorize the Establishment or Incorporation of a State Clearing House Association if Necessary."

2. Also including the Demurrer and Motion to Dismiss in said proceeding dated April 14, 1933.

3. Also including the Return and Answer of Hunter A. Gibbes in said proceeding, dated April 14, 1933.

4. Also opinion, decision and judgment of the Supreme Court of South Carolina in said proceeding, rendered and filed May 11, 1933.

5. Also Petition for Appeal, Order Allowing Appeal and Assignment of Errors served and filed herein by appellant, dated May 17, 1933.

D. W. Robinson, Attorney for Hunter A. Gibbes, Appellant.

May 24, 1933.

[fols. 73 & 73a] Service of the foregoing Designation by Appellant accepted and copy thereof retained this the 24 day of May, 1933.

John M. Daniel, Atty. General of S. C.; Melton & Belser, Attorneys for Appellees.

[fol. 73b] [File endorsement omitted.]

[fol. 74] SUPREME COURT OF THE UNITED STATES

DESIGNATION BY APPELLEES OF ADDITIONAL PARTS OF THE RECORD WHICH THEY THINK MATERIAL HEREIN Filed June 5, 1933

In accordance with the rules of this Honorable Court the appellees above named hereby designate the following additional parts of the records which they think material for consideration herein, to wit:

I

The order of the Governor annexed as an exhibit to the original petition in this cause providing rules and regulations for the appointment of conservators for State Banks and Cash Depositories in the State of South Carolina adopted and approved by the Governor of South Carolina on March 9, 1933, embraced in paragraphs (1), (2), (3), (4), and (5) of said exhibit annexed to the original petition for prohibition.

[fol. 75] II

Return to alternative writ of prohibition by Honorable W. H. Townsend, Judge of the Fifth Judicial Circuit of South Carolina.

John M. Daniel, Atty. General; J. Ivey Humphreys, Asst. Atty. General; Melton & Belser, Attorneys for Appellees.

June 2, 1933.

[fol. 76] State of South Carolina,
County of Richland:

Before me personally appeared Helen Clayton, who, being duly sworn, says that on the 2nd day of June, 1933, at Columbia, S. C., she served the foregoing Designation by Appellees upon D. W. Robinson, attorney for appellant by delivering a copy thereof to D. W. Robinson, Jr., at the office of said D. W. Robinson and leaving the same with him for the said D. W. Robinson, who was temporarily absent from said office.

Helen Clayton.

Sworn to before me this 2nd day of June, 1933.
L. F. Calvo, Notary Public of S. C. (L. S.)

[fol. 77] [File endorsement omitted.]

Endorsed on cover: File No. 37,720. South Carolina Supreme Court. Term No. 117. Hunter A. Gibbes, representing himself and all other depositors of the Central Union Bank of South Carolina, etc., appellant, vs. Simpson J. Zimmerman, individually and as conservator of the Central Union Bank of South Carolina, et al. Filed June 1, 1933. File No. 117, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL.

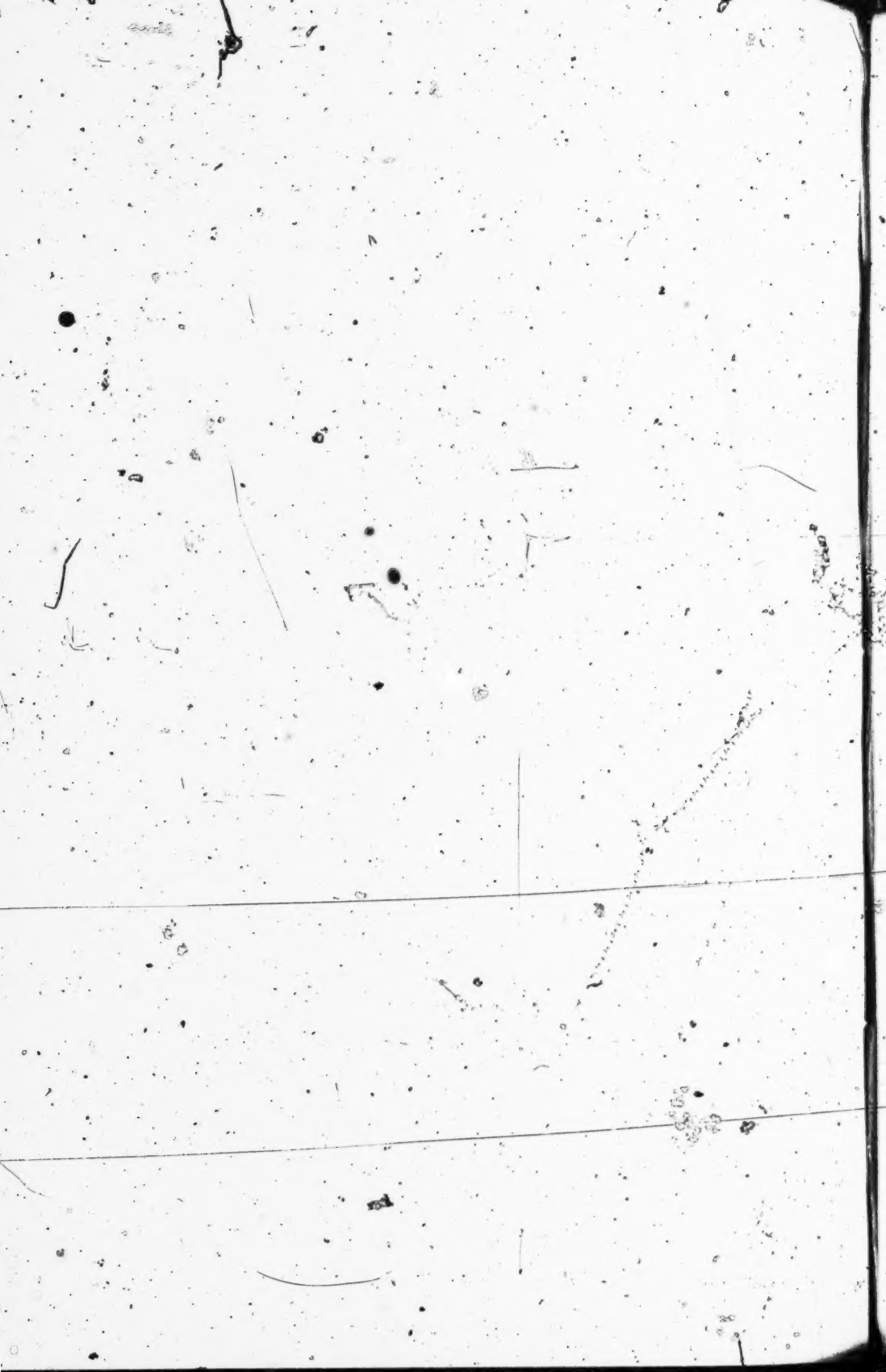
MOTION.

To the Honorable Supreme Court of the United States:

The appellant, Hunter A. Gibbes, respectfully moves this Honorable Court to permit him to file the annexed statement of the basis upon which it is contended that this the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of South Carolina in question herein at this time as if presented and served at the time the Petition for Appeal and Assignment of Errors were presented to the Chief Justice of the Supreme Court of South Carolina.

D. W. ROBINSON,
Attorney for Hunter A. Gibbes, Appellant.

May 29, 1933.



SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, Representing Himself and All Other Depositors of The Central Union Bank of South Carolina, etc., Appellant,

vs.

SIMPSON J. ZIMMERMAN, Individually and as Conservator of The Central Union Bank of South Carolina, et al.

STATEMENT OF THE BASIS UPON WHICH IT IS CONTENDED THAT THIS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COUFT OF THE STATE OF SOUTH CAROLINA IN QUESTION HEREIN.

To the Honorable Supreme Court of the United States:

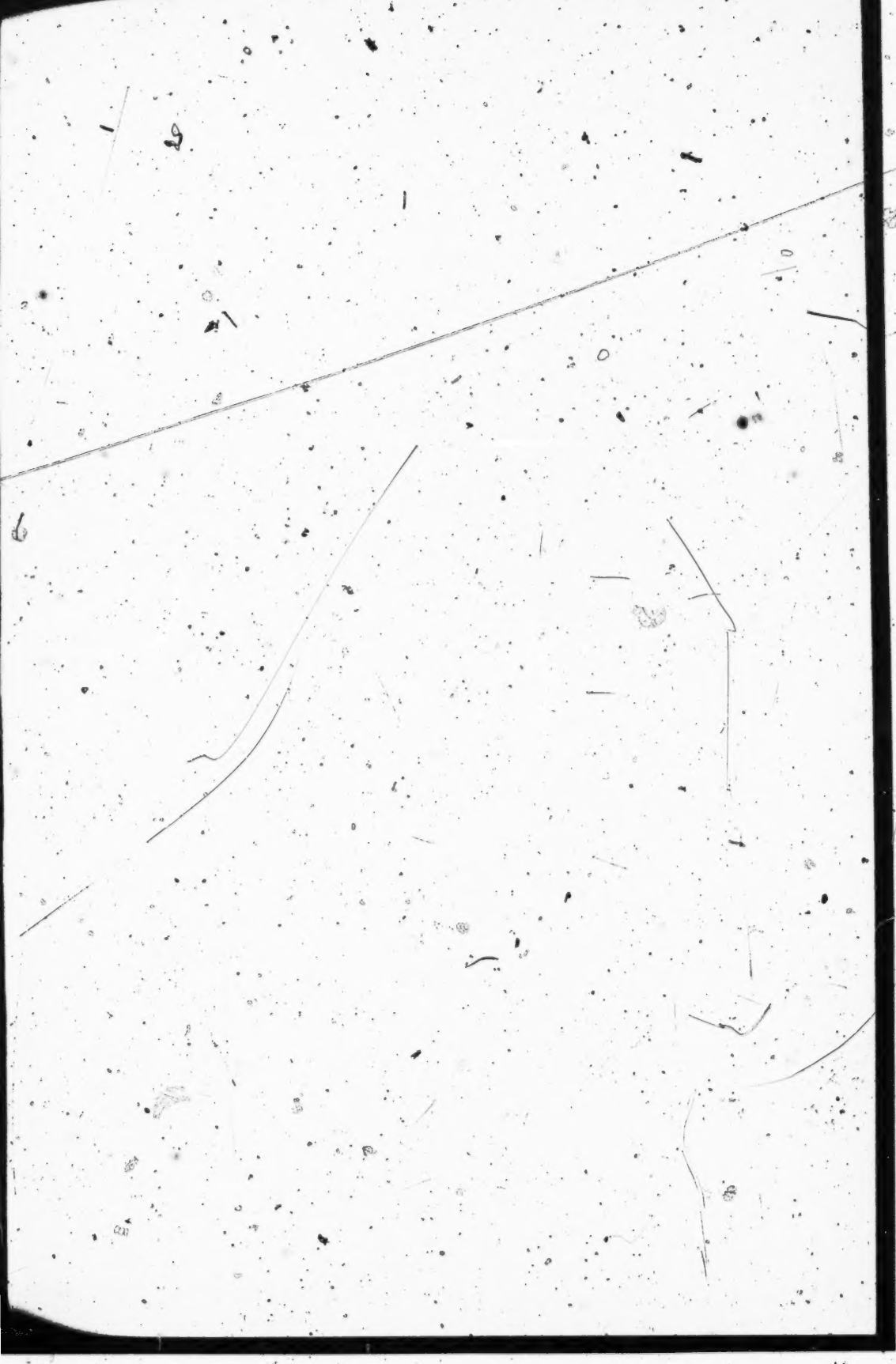
The appellant, Hunter A. Gibbes, representing himself and all other depositors of The Central Union Bank of South Carolina similarly situated, would respectfully state to this Honorable Court that he invokes the jurisdiction of the said Court on the appeal from the Supreme Court of the State of South Carolina in this case upon the basis:

The Act of the General Assembly of the State of South Carolina passed and ratified on March 9, 1933,

entitled "A bill to authorize and direct the Governor of the State of South Carolina to assume plenary control of the State Banking Department and of all banks, banking institutions, building and loan associations, cash depositories or other institutions doing a banking business of whatever nature, and to make, issue and promulgate such rules, regulations and/or instructions as may be necessary to direct, control and protect such banks, banking institutions, building and loan associations and cash depositories and depositors and to provide penalties for violation of such rules and regulations, and to regulate litigation in reference thereto, and to authorize the establishment or incorporation of a State Clearing House Association if necessary", as the said Act is construed and interpreted by the decision of the Supreme Court of the State of South Carolina, takes from the appellant, Hunter A. Gibbes, his property and property rights without compensation and without due process of law; and the said Act, as construed by said decision of the Supreme Court of the State of South Carolina, impairs the contractual rights of Hunter A. Gibbes, all in violation of the Constitution of the United States.

The jurisdiction of this the Supreme Court of the United States is invoked for the foregoing reasons under the provisions of Section 237 of the Judicial Code of the United States as amended. U. S. C. A., Title 28, Sec. 344 (*a*) and (*b*).

D. W. ROBINSON,
Attorney for Appellant, Hunter A Gibbes.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Appellant respectfully submits the following in opposition to the motion to affirm herein:

I.

Police power cannot justify the passage of a law or ordinance which runs contrary to the limitations of the Federal Constitution.

Buchanan v. *Warley*, 245 U. S. 60, 74, 62 L. Ed. 160.

6 *R. C. L.*, pp. 191-2, § 190; pp. 195-6, § 193; pp. 198-9, §§ 194-5.

6 *R. C. L.*, Permanent Supp., pp. 1647-9.

State v. *Moore*, 10 S. E. 144, 17 A. S. R. 696.

II.

Contractual and property rights of appellant are impaired and taken by the Act of the General Assembly of South Carolina in question in this appeal in violation of the provisions of the United States Constitution, Art. I, Sec. 10.

1. *Contractual Right.*—Article IX, Sec. 18, of the Constitution of South Carolina of 1895, provides:

> Liability of Stockholders—In Banks.—The stockholders of all insolvent corporations shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

Vol. III, Code of 1932, Sec. 7868 (which is but a re-enactment of a statute which has been in existence for many years) provides:

> **Liability of Stockholders of Insolvent Banks.**—The stockholders of all insolvent banks and banking institutions, whether heretofore or hereafter incorporated under the Act of Assembly of this State, either general or special, shall be individually liable to the creditors thereof, other than depositors, only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in all such banks and banking institutions shall be liable to the depositors therein in a sum equal in amount to their stock over and above the face value of the same.

This liability of the stockholders is contractual in its nature, arises at the time of the subscription and is for the benefit of the depositors.

Fisher v. *Chisholm*, 159 S. C. 395, 398, 157 S. E. 139 (2).

The right to enforce the double liability of the stockholders for the benefit of the depositors is by means of a suit in equity and a receiver, the remedy which the appellant was seeking to enforce.

Branchville Motor Co. v. *Adden*, 158 S. C. 90, 94-5, 155 S. E. 277 (3), and cases cited.

In the case at bar the depositor, appellant, on March 4, 1933, at which time he made or had his deposit in the bank, had the right, and the remedy by receivership to enforce it, just above mentioned.

The Act of March 9, 1933, set forth and attached to the petition for the writ of prohibition, as the same is administered and enforced by the Governor and his

Banking Board and construed and interpreted by the decision of the Supreme Court of the State of South Carolina from which this appeal is taken, prohibits the appellant from enforcing this right and takes away from him this remedy which is a vital portion of his contract, thus violating the provisions of the United States Constitution.

Re Fidelity State Bank, 209 Pac. (Idaho) 447, 31 A. L. R. 781, etc.

6 *R. C. L.* 355, etc.

2 *R. C. L.*, Supp. 100.

4 *R. C. L.*, Supp. 407.

Sterling v. *Constantin* (Adv. Ops.), 77 L. Ed. 262, 264, 265.

U. S. C. A., Const., Art. 1, Sec. 10, Part 2, pp. 92-3, and cases. Also notes at pp. 503, 505, 507.

III.

The right of appellant in the assets of the Bank (admittedly insolvent) and to have them administered through a receivership, is taken without due process by the Act of the General Assembly of South Carolina of March 9, 1933, as administered by the Governor and his Banking Board, and as interpreted by the decision from which this appeal is taken.

In the case at bar, as shown by the complaint in the original action in the Court of Common Pleas for Richland County (R. 16), admitted by the demurrer therein and also by the complaint in the petition for the writ of prohibition in the Supreme Court of the State of South Carolina, the Governor, acting under the plenary

powers attempted to be conveyed by the Act of March 9, 1933, has arbitrarily appointed Mr. Zimmerman, Vice president, a director and stockholder of the bank, and has placed him in charge of the bank, and of its assets and property, and he is proceeding to conduct a banking business based upon these assets and property; and we respectfully submit:

1. *The assets and property of the bank belong to its creditors, of whom the appellant, as a depositor, is one.*

Rice et al. v. *City of Columbia et al.*, 143 S. C. (1927) 516, 539, 141 S. E. 705 (2).

Livingstain v. *Banking Co.*, 77 S. C. (1907) 305, 310, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568.

Peurifoy, Receiver, v. *Cambell, Receiver,* 145 S. C. (1928) 1, 7, 142 S. E. 788 (1).

U. S. v. *Butterworth, etc., Corp.*, 269 U. S. 504 (2), 70 L. Ed. 380, 383.

Coriell v. *Morris White, Inc.*, 54 F. (2d) (C. C. A., N. Y.) 260.

2. *These property rights can only be enforced and protected through a receivership by the courts.*

Cases cited just above, and especially

Blanchville Motor Co. v. *Addens, supra.*

Packer v. *Bank*, 53 S. C. 583, 31 S. E. 673, 674.

In addition to these authorities we have an express statutory enactment passed in 1929, Code 1932, Vol. III, Sec. 7855, Sub-section (6), which makes a receivership essential in enforcing the stockholders' liability, and which reads as follows:

(6) Stockholder's Liability.—Any receiver appointed to liquidate the assets of any closed State bank shall, under the authority of this section when it is necessary to collect the liability of stockholders, have full power and authority to demand of such stockholders the statutory liability, provided for in section 7868, and upon failure of any stockholder to pay into his hands such liability, he is hereby invested with full power and authority to bring suit, either individually or collectively, against such stockholder, or stockholders, for the collection of such liability, and all funds received from said assessment by payment with or without suit shall be kept as a separate fund to be paid to the depositors solely. Said receiver shall receive as compensation for the collection of the stockholders' liability, two and one-half (2½) per cent and in case same is placed in the hands of the attorney for collection by suit, or otherwise, an additional five per cent may be paid to the attorney for his services, or so much as the court may decide the attorney is entitled to.

3. *Fitness of Receiver.*—It will be observed by the Court that the depositors and the creditors have no voice in the selection of a receiver and/or in passing upon his qualifications. In the instant case he is named arbitrarily by the Governor, who has selected a man who is vice-president of the bank, and who is a director and a stockholder.

A receiver should be entirely impartial, as well as competent.

Virginia-Carolina Company v. *Hunter*, 84 S. C. (1909) 214, 224, 66 S. E. 177 (3).

Ex Parte Citizens Exchange Bk., 140 S. C. (1927) 471, 494, 139 S. E. 135 (11) and cases cited.

The rule in South Carolina would exclude the appointment of an officer of the bank as in the present case and is thus expressed in both of the above entitled cases:

> The practice of making such appointments (an officer of the corporation) has been disapproved, however, and the courts have refused to designate such persons as receivers, unless the case is exceptional and urgent and the parties interested consent thereto, since receivers should be impartial between the parties in interest, and have held them to be improper persons to be appointed; but often this attitude of the courts against the appointment of such persons as receivers is affected by the consideration of other circumstances, such as the connection of the person proposed with the misfortune of the company.

The statutory law of the State of South Carolina, as embodied in Vol. III, Code of 1932, Sec. 7855, contains the following:

> "Provided, that in appointing a receiver or liquidating agent as provided in this section, no officer, director, or attorney who was connected or associated with said bank at the time it was closed or taken over by the bank examiner, or who, within two years prior to that time had been an officer, director or attorney, shall be named as receiver of said bank."

If Mr. Zimmerman acts in behalf of the creditors he must enforce the liability of the stockholders, one of whom he is. The acts of the Board of Directors and of the officers are likely to come in question and he would thus be in a most awkward position to protect the interest of the creditors. If the Court were appointing a receiver, he would be disqualified because it is certainly the duty of the Court to appoint an impartial person, as has been repeatedly said.

For the foregoing reasons, we respectfully submit that the motion to affirm should be denied and that the Act of the General Assembly of the State of South Carolina, as administered by the Governor and his Banking Board, and as interpreted in the decision from which we appeal, should be declared null and void as impairing the obligation of the contract of the appellant, depositor, and as taking his property without due process.

Respectfully submitted,

D. W. Robinson,
Attorney for Appellant Hunter A. Gibbes.

June 24, 1933.

Service of the foregoing brief in opposition to motion to affirm the judgment of the Supreme Court of the State of South Carolina in the foregoing case is hereby acknowledged and a copy thereof retained this the 22nd day of June, 1933, at Columbia, S. C.

Melton & Belser,
Attorneys for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 117.

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF APPELLANT.

JURISDICTION ON APPEAL FROM STATE SUPREME COURT—UNITED STATES CONSTITUTION—DUE PROCESS—IMPAIRING CONTRACT.

STATEMENT.

This was an action begun on April 11, 1933, by the issuance by the Circuit Judge of a Rule to Show Cause in the Court of Common Pleas for Richland County, South Carolina, by the appellant, Hunter A. Gibbes, a depositor in Central Union Bank of Columbia, South

Carolina, in behalf of himself and all other creditors and depositors of that Bank. R. p. 3, par. 3; p. 7, par. 1. The action is against the Governor of the State and the State Treasurer, representing the State Banking Board and their appointee, Simpson J. Zimmerman, as Conservator of the same bank.

The action by the appellant was for the purpose of having a receiver appointed to take charge of the property and assets of the bank, to enforce and collect the stockholders liability, to restrain all proceedings by creditors and depositors other than in this action, and to have declared null and void the Act of the General Assembly of South Carolina, passed on March 9, 1933 (R. pp. 12-20; p. 3, par. 3; pp. 7-12, pars. 1-16.)

After the commencement by appellant of his action of April 11, 1933, to-wit, on April 12, 1933 (R. p. 2), the Appellees filed a petition in the Supreme Court of South Carolina (R. pp. 2-6) asking that Court to issue its writ of prohibition to restrain and enjoin the Court of Common Pleas of Richland County and the Appellant from further proceedings in the cause begun on April 11, 1933.

The validity under the Constitution of the United States of the Act of the State Legislature of March 9, 1933, was raised in and by the pleadings in both cases (R. p. 5, f. 11; pp. 5-6, par. 11; p. 10, par. 11; p. 11, par. 4 of the first action; pp. 22-3, pars. 3-4; p. 24, par. 8; pp. 24-5, par. 10; p. 26, par. 13 of second action).

The facts on which the first action is predicated (R. pp. 7-12), indeed all the facts, are practically unchallenged.

The Supreme Court on the hearing on the application for the writ of prohibition upheld the validity of the Act of March 9, 1933 (R. pp. 27-35) and granted the writ as prayed for, restraining "all depositors and creditors" * * * from proceeding in any way against the Bank, its officers, stockholders, employees or its assets, except in this action.

There is practically no controversy in the case except as to the validity of the Act of March 9, 1933, as construed by the Supreme Court of South Carolina. In the action begun by appellant to have a Receiver appointed, to have the Act of March 9, 1933, declared null and void, etc., the appellant charged, (p. 8, par. 8) that the bank suspended its regular banking functions at the close of business, March 4, 1933, and since then has refused to pay anything to its depositors, including the appellant, on account of deposits in the bank.

Appellant's statement (p. 9, par. 9) is unchallenged that there is no chance of re-opening or re-organizing the bank and that its property and assets should be liquidated and applied to the payment of its debts to depositors and creditors.

Appellees in their petition for writ of prohibition (pp. 4-5, par. 8) claimed they were investigating but "that it is impossible to tell at this time (April 12, 1933) and prior to the completion of said audit, whether or not the said banks (there was a chain) will be reorganized or liquidated", etc. But it will be conceded that the bank is insolvent and the conservator, one of the appellees, is proceeding to liquidate it under the authority of the Act of March 9, 1933, and certain statutes enacted since said date.

It is also to be noted, as alleged by appellant and undisputed, that the appellee, Zimmerman, on being appointed conservator, proceeded and was proceeding, at the time (April 11th) of the commencement of the action in the Court of Common Pleas for receivership, to receive and pay out deposits on special trust accounts and exercising limited banking functions, thereby incurring expenses against the assets of the bank which should be preserved for depositors.

The appointment of the conservator and his acts in conducting the banking business and using the assets of the bank were and are without any opportunity to appellant or any depositor to have any voice therein. Indeed, this constitutes one of the alleged grounds of the unconstitutionality of the law of March 9, 1933 (R. p. 22, par. 3(a)).

The questions presented for the consideration of this Court are whether or not the Act of the General Assembly of the State of South Carolina of March 9, 1933 (R. pp. 12-16) as construed and interpreted by the Supreme Court of South Carolina in the opinion in the record herein (pp. 27-35), (1) deprives appellant of his property without due process of law; (2) impairs the obligation of his contract.

ARGUMENT.

I. JURISDICTION.

The jurisdiction of this Court is invoked under Sect. 237 of the Judicial Code as amended, U.S.C.A. Title 28, Sect. 344 (a) and (b), upon the grounds that the Act of the General Assembly of South Carolina of March 9, 1933 (R. pp. 12-20), as interpreted by the Supreme Court of that State (R. pp. 27-36):

(a) Deprives appellant of his property without due process;

(b) Impairs the obligation of his contract in violation of the provisions of the Constitution of the United States, Amendment XIV. and Art. I, Sec. 10. The State Supreme Court has passed on these questions adversely to the Federal claim.

Home Ins. Co. v. Dick, 281 U. S. 397, 407, 74 L.Ed. 926, 933.

II. DUE PROCESS.

Assignment of Errors I.

Notice and a reasonable opportunity to be heard are essential to due process, in taking or affecting the property or property rights of any citizen.

Powell v. Alabama (decided Nov. 7, 1932), 77 L.Ed. 78, 89, and citations.

Sterling v. Constantin (decided Dec. 12, 1932), 77 L.Ed. 254, 262, 264, and citations.

Amr. Surety Co. v. Baldwin (decided Nov. 14, 1932), 77 L.Ed. 125, 131, and citations.

Assets of an insolvent bank (or other corporation) are property of its depositors and creditors.

Rice v. City of Columbia, 143 S. C. 516, 539, 141 S. E. 705 (2).
Peurifoy, Receiver, v. Gamble, 145 S. C. 1, 7, 142 S. E. 788 (1).
Citizens Bk. v. Bradley, 136 S. C. 511, 514-15, 134 S. E. 510.
Coriell v. Morris White, Inc., 54 F. (2d, 1-6) 255, 258, 260. (C.C.A., N. Y.)

The Circuit Court of Appeals of New York, in *Coriell v. Morris White, Inc.*, speaking through Judge Manton, says:

> Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment of its creditors.

The Supreme Court of South Carolina announces the principle well settled in that state in the case of *Rice v. City of Columbia*, thus:

> The necessary, inevitable result of this conclusion is that the very moment a corporation, banking or other, reaches the point of insolvency (presumptively, as a matter of course, to the knowledge of the managing agents of the corporation), certainly in the immediate prospect of dissolution and bankruptcy, its assets become impressed with a solemn trust to be distributed ratably among its creditors, subject, of course, to liens; and the managing agents become the administrators of that trust. This is so manifestly just and right as to appeal instantly and most strongly to the conscience of a chancellor.

In the present case after the appellant had become and was a depositor in the Bank (R. p. 7, par. 1), the Governor and Board of Bank Control (R. p. 9, par. 6) appointed the Appellee, Simpson J. Zimmerman, Conservator of the Bank under the Act of March 9, 1933, without notice to Appellant or any other depositor (R. p. 9, par. 6; p. 24, par. 10). Since his appointment the Conservator has taken charge of the property and assets of the Bank and has proceeded to conduct a limited

banking business, using and endangering the assets and property of the bank and incurring expenses without the approval and against the will of the owners, depositors and creditors (R. p. 8, par. 5; p. 24, par. 10). The appellant and other depositors are enjoined and prohibited in the action from asserting any claims against this Conservator.

In the case of *Sterling v. Constantin*, cited above, this Court, in discussing the exercise by the Governor of Texas of a power under circumstances somewhat similar to that claimed by appellees in the present case, says:

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. 3, §2) and, so extending, the Court has all the authority appropriate to its exercise.

The operation of these trust accounts, which yielded no income to the bank, by the Conservator required him to maintain a large bookkeeping force and to incur other overhead expenses at the expense of the old depositors. This violates the right of the appellant to share ratably in the assets and deprives him of his property without due process.

III. IMPAIRING THE OBLIGATION OF A CONTRACT.

Assignment of Errors II.

We also claim that under the Constitution and statutory laws of South Carolina a depositor is given as against the stockholders in a banking institution, the right to collect from the stockholders an assessment equal to and in addition to the full face par value of his stock, sometimes called double liability; while, under the Act of Mar. 9, 1933, (R. p. 15, Sect. 4) as interpreted and construed by the Supreme Court of South Carolina, in this case, and as construed and interpreted by the Governor and his Banking Board, the plaintiff and all depositors are prevented from seeking and enforcing this right and any remedy therefor R. p. 9, par. 6; p. 22, par. 3(b), in violation of our rights as guaranteed by the Federal Constitution, Art. I, Sec. 10, Clause 1.

The contract rights of depositors in a Bank when it closes are prescribed by:

1. The Constitution of the State of South Carolina, adopted in 1895 and in force since that time, Art. IX, Sec. 18, as follows:

> Art. 9. Sec. 18. **Liability of Stockholders—In Banks.**—The stockholders of all insolvent corporations shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them: Provided, That stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

2. By the statutory laws, Vol. III, Code of 1932, Sect. 7868:

> **§ 7868. Liability of Stockholders of Insolvent Banks.**—The stockholders of all insolvent banks and banking institutions, whether heretofore or hereafter incorporated under Act of Assembly of this State, either general or special, shall be individu-

> ally liable to the creditors thereof, other than depositors, only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in all such banks and banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

This last section was enacted and has been in force since 1905, XXIV Stat. of S. C., p. 889.

The Constitution and the statutes were admittedly in force at the time of and long prior to the formation of the Central Union Bank or its predecessors.

This "liability is contractual in its nature, arising by reason of the purchase (or subscription) of the stock, the subscription being a voluntary act of the purchaser, who makes it in contemplation of all applicable law, understanding that he may be called upon for such contribution."

> *Fischer v. Chisolm*, 159 S. C. 395, 398, 157 S. E. 139 (decided in 1930).

This is but an announcement of the general principle that the law in force at the time of the making is a part of all contracts.

> *Amer. Ins. Union v. Lowry*, 62 F. (2d) 209, 213, (C.C.A., Texas, 1932), and citations.

The only remedy for the recovery of this double liability from the stockholders is through and by a receiver as prescribed by the statutory laws of the State contained in III. Code of 1932, § 7855, sub-sect. (6), as follows:

> (6) *Stockholders' Liability.*—Any receiver appointed to liquidate the assets of any closed State bank shall, under the authority of this section when it is necessary to collect the liability of stockholders, have full power and authority to demand of such stockholders the statutory liability, provided for in section 7868, and upon failure of any stockholder to pay into his hands such liability, he is hereby invested with full power and authority to bring suit,

either individually or collectively, against such stockholder, or stockholders, for the collection of such liability, and all funds received from said assessment by payment, with or without suit, shall be kept as a separate fund to be paid to the depositors solely. Said receiver shall receive as compensation for the collection of the stockholders' liability, two and one half (2½) per cent. and in case same is placed in the hands of the attorney for collection by suit, or otherwise, an additional five per cent. may be paid to the attorney for his services, for so much as the Court may decide the attorney is entitled to.

That this remedy, which was first prescribed by statute in 1929, and has been in force ever since, is exclusive, see

Branchville Motor Co. v. Adden, 158 S. C. 90, 95, 155 S. E. 277 (3). (Decided in 1930).

Pertinent portions of the opinion in this case are:

> Neither the statute, Section 3998, nor the Act of 1929 confers upon the depositor an enforceable right; that is accomplished by the Constitution, to which the legislation adds nothing. Until the Act of 1929 was passed the depositor looked to the inexhaustible fountain of equity jurisprudence for his remedy, which, as we have seen, was a suit in the nature of a creditors' bill in equity. The equitable principles established in England have been here adopted as a part of the common law, and applied to the instance in point upon the ground that, where there is a right, there must be a remedy.
>
> It must be conceded that, where there is an existing established right, and an existing remedy, either statutory or at common law, a new statute, recognizing the right and providing a new remedy, will not be held to have superseded the existing remedy unless:
>
> 1. There is in the new Act an explicit repeal of the old remedy; or
>
> 2. The enforcement of the new remedy necessarily presents a situation incompatible with the continued existence of the old remedy; or
>
> 3. It clearly appears that by the new Act the Legislature intended to take over the entire field of operations, to the necessary exclusion of the old remedy.

In addition to his right to sue on the stockholders' liability the Appellant has the right, upon the refusal of the Bank to pay his deposit on demand, to go into the Courts and sue for his deposit, and if the Bank was insolvent, to share ratably in the unpledged assets of the Bank, to vote at a depositors' meeting for a Receiver to administer the affairs of the Bank under the provisions of the Code of 1932, § 7855, which required that a majority of the depositors nominate a Receiver, and to appeal to an Equity Court on the insolvency of the Bank for the purpose of having a meeting of the depositors called for the purpose of having a Receiver appointed, an orderly liquidation effected and a ratable share of the assets paid to the Appellant.

The Act of March 9, 1933, prohibits the Appellant for a period of eighteen months from enforcing any of these contractual rights and imposes upon him a $5,000.00 fine, or a period of imprisonment if he attempts to enforce these contractual rights. This constitutes an impairment by the State of South Carolina of the obligation of the Appellant's contract with the Bank.

The Act of March 9, 1933, set up and relied on by Appellees in this case, Sec. 4 (R. p. 15), provides among other things:

> And all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, banking institutions, * * * , from instituting any legal proceedings of any nature whatever against any bank * * * without first obtaining the written approval of the Governor.

We alleged in our complaint, which is set forth in and as a part of the action by appellees herein and is not disputed (R. p. 9, par. 2): "That the depositors of the bank, under the terms of this Act, are prevented from bringing any action against the bank itself without the approval of the Governor. That the plaintiff herein has asked the Governor for authority to bring action against the bank for the purpose of determining its solvency and for providing for its orderly liqui-

dation but said request has to date been refused by the Governor of the State."

The Supreme Court of the State, in its decision (R. pp. 21-35) has upheld the Act in its full force and validity and has granted and issued its writ of prohibition preventing the appellant herein and other depositors from enforcing their rights against the stockholders.

We submit:

A State cannot dissolve a contract of a depositor with a bank.

First National Bk. of San Jose v. California, 262 U. S. 366, 370, 67 L.Ed. 1030, 1035.

Part of the obligation of a contract is the means of enforcement.

U.S.C.A., Const., Part 2, Art. I, §10, pp. 42-3, and cases.

Substantial remedy must be given.

U.S.C.A., Const., Part 2, Art. I, §10, Note 503, 505, 507, pp. 200-202.

A State can change the remedy provided it does not deny or so embarrass with conditions as to seriously impair value.

U.S.C.A., Const., Part 2, Art. I, §10, Note 502-3-4-5-6, pp. 199-200.
Penniman's Case, 103 U. S. 720, 26 L.Ed. 602.
Von Hoffman v. Quincey, 4 Wall. 553, 18 L.Ed. 403.
Memphis, etc. R. Co. v. Tenn., 101 U. S. 339, 25 L.Ed. 960.

The degree of impairment is immaterial.

U.S.C.A., Const., Part 2, Art. I, §10, Note 483, p. 185.

IV. POLICE POWER.

The decision of the Supreme Court of the State and the contention of appellees is that the statutory law contained in the Act of March 9, 1933, is justified under the police power of the State and therefore valid.

The answer to this is: "But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution".

Buchanan v. Warley, 245 U. S. 59, 74, 62 L.Ed. 149, 160.
6 *R.C.L.*, pp. 191-2, §190; pp. 195-6, §193; pp. 198-9, §§194-5.
6 *R.C.L.*, Permanent Supp., pp. 1647-9.
State v. Moore, 10 S. E. 144, 17 A.S.R. 696, 104 N. C. 714.
6 *R.C.L.*, Cases in Note, p. 192 (9).
Sanders v. Com., 117 Ky. 1, 77 S.W. 358, 111 A.S.R. 219, 1 L.R.A. (N.S.) 932.
6 *R.C.L.*, p. 199, §194, and note §195.
People Ex Rel. Durham v. La Petra, 230 N. Y. 429, 130 N.E. 601, 16 A.L.R. 152, 159, 160, 162, 168, 164 (Op. by Pound, J.).

V. EMERGENCY.

It is also contended that this Act was passed to meet an emergency and the argument is made that for this reason the provisions of the Federal Constitution do not apply.

We respectfully submit that while the Courts are open and functioning there can be no emergency which would set aside the very greatest safeguards of our Federal Constitution. It was written for the very purpose of meeting emergencies.

Ex Parte Milligan, 4 Wall. 2, 121, 18 L.Ed. 290, 295.
Address by Circuit Judge John J. Parker before the American Bar Association, *Amr. Law Journal*, Oct., 1933, and the argument of Judge Black in the Milligan Case.

We commend the language of the Court in the *Milligan case*, to-wit;

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.

No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine can lead directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

Respectfully submitted,

D. W. ROBINSON,
Attorney for Hunter A. Gibbes, Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JOHN M. DANIEL,
J. IVEY HUMPHREY,
MELTON & BELSER,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, Representing Himself and All Other Depositors of The Central Union Bank of South Carolina, etc., Appellant,

vs.

SIMPSON J. ZIMMERMAN, Individually and as Conservator of The Central Union Bank of South Carolina, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT BY APPELLEES OF GROUNDS AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES HEREIN AND MOTION TO DISMISS THE APPEAL.

In accordance with the rules of this honorable Court the appellees above named hereby state and present to

the Court the following grounds against the jurisdiction of this Court in this matter and move to dismiss the appeal herein:

I.

Because, by virtue of the great emergency then existing, as disclosed by the Act of the General Assembly of the State of South Carolina, approved March 9, 1933, and as found by the Supreme Court of the State of South Carolina in the decision from which the appeal is sought, the said Act vesting the Governor of the State with plenary powers to supervise and control the banking department and banks of said State in accordance with the provisions of said Act was a reasonable and proper exercise of the police powers of the said State and for the public good.

II.

Because the said Act obviously and manifestly does not deprive the appellant of property or any contractual right or due process of law, but relates to the remedy by which his property and rights may be preserved and secured to him.

III.

Because by subsequent Act of the General Assembly of the State of South Carolina entitled "An Act to provide for the liquidation of banks or banking institutions after a conservator has been appointed," approved by the Governor of the State of South Carolina May 16, 1933, and now of force, it was further enacted as follows:

"An Act to Provide for the Liquidation of Banks or Banking Institutions After a Conservator Has Been Appointed.

SECTION 1. Be it enacted by the General Assembly of the State of South Carolina: When the Governor shall conclude, after advising and consulting with the Board of Bank Control, that any bank for which a Conservator has been or hereafter shall be appointed, is insolvent or in imminent danger of insolvency and it is necessary in order to protect the interest of depositors and creditors to liquidate such bank, he shall order the liquidation thereof; and when liquidation shall have been so ordered the same shall be under and by the Conservator appointed for such bank, and shall continue until the liquidation of said bank has been completed. And such Conservator shall be vested with the same powers and duties as receivers of banks under existing laws, except as in his discretion the Governor acting with the Board of Bank Control shall fix or limit the liquidating expenses of such bank or banking institution. The liquidation of all such banks shall be under such rules and regulations as may be prescribed by the Governor after consulting and advising with the Board of Bank Control, and the Conservator shall have the right to apply to a court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank.

SECTION 2. The depositors of any such bank in liquidation shall be authorized by the vote of a majority present at a meeting of such depositors called by such Conservator on order of the Governor after ten days' notice to each

depositor by mail, at his last known post office address, to select a committee of not exceeding three depositors to confer and advise with the Conservator and the Board of Bank Control, in the liquidation of said bank. It shall be the duty of the Conservator to call the depositors together for the purpose of electing said committee and he is hereby requested to call said meeting.

SECTION 3. That all appointments of Conservators heretofore made by the Governor by and with the advice of said Board of Bank Control shall be and hereby are ratified and confirmed.

SECTION 4. The term "banks" as used in this Act shall be construed to include cash depositories, building and loan associations and other institutions doing a banking business.

SECTION 4-A. That the terms hereof shall not be applicable to banks, at present, in liquidation under a receivership appointed by the order of Court and this Act shall not annul, invalidate or remove any Receiver engaged, at present, in the liquidation of any bank.

SECTION 5. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SECTION 6. This Act shall take effect immediately upon its approval by the Governor.

Approved the 16th day of May, 1933.

I. C. BLACKWOOD,
Governor."

That said Act is in *pari materia* with the Act of March 9, 1933, and the Acts should be construed to-

gether; and it being admitted that a conservator for the said The Central Union Bank of South Carolina has been appointed, and it being urged by the appellant as ground for this appeal that said bank is insolvent, it is manifest that the conservator thereof under the terms of the said Acts is or "shall be vested with the same powers and duties as receivers of banks under existing laws," and that the appellant, while his remedy as provided by previous laws has been changed, has not by the provisions of the said Act been deprived of his property or property rights, but the same will be protected and preserved by the method provided thereby for the rehabilitation or liquidation of the said bank.

IV.

Because the stockholders' liability, the benefit of which is claimed by the appellant, under the provisions of said Acts will be protected and preserved by the conservator, pursuant to the powers conferred upon him, as effectively as by a receiver acting under the previous provisions of law.

V.

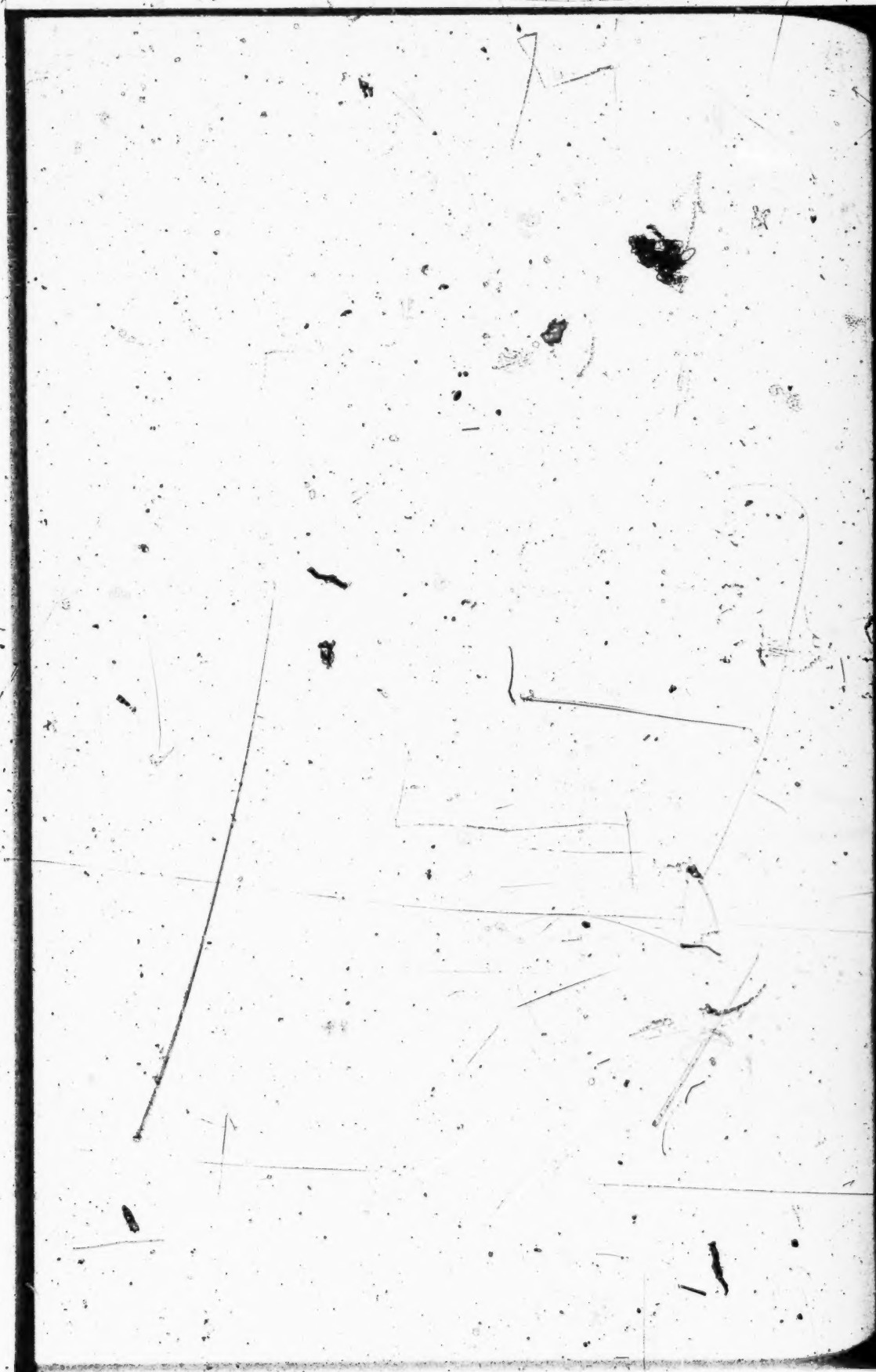
Because the appellant has failed to present the statement disclosing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgment in question, as required by paragraph 1 of rule 12 of the rules of this Court, or to serve upon the appellee, as required by paragraph 2 of the said rule, such statement and the further statement direct-

ing attention to the provisions of paragraph 3 of said rule as required, though much more than the time for such service has elapsed.

And on the grounds above set forth the appellees move and apply to the Court herein for an order dismissing the said appeal herein.

JOHN M. DANIEL,
Attorney General;
J. IVEY HUMPHREY,
Ass't Atty. General;
MELTON & BELSER,
Attorneys for Appellees.

Columbia, S. C., June 2, 1933.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

MOTION TO AFFIRM.

To the Honorable Supreme Court of the United States:

The appellees above named, as alternative and in addition to and without waiving their motion to dis-

1n

miss the appeal heretofore filed herein, respectfully move this Honorable Court to affirm the judgment of the Supreme Court of the State of South Carolina from which the appeal is taken, on the following grounds:

I.

Because by virtue of the great emergency then existing, as disclosed by the Act of the General Assembly of the State of South Carolina, approved March 9, 1933, and as found by the Supreme Court of the State of South Carolina in the decision from which the appeal is sought, the said act vesting the Governor of the State with plenary powers to supervise and control the Banking Department and banks of said State in accordance with the provisions of said Act was a reasonable and proper exercise of the police powers of the said State and for the public good.

"It is well established that the banking business is affected with a public interest so as to be subject to legislative regulation and control as a part of the police power of the State."

3 *R. C. L.* 379;
7 *C. J.* 480-481;
Branchville Motor Company v. *Adden*, 158 S. C. 90, 155 S. E. 277;
Fischer v. *Chisholm*, 159 S. C. 395, 157 S. E. 139;
Witt, Receiver, v. *Peoples State Bank*, 166 S. C. 1;
Graham, Receiver, v. *Berry*, 166 S. C. 277, 164 S. E. 277;

Noble State Bank v. *Haskell*, 219 U. S. 104, 55 L. Ed. 112;
Shallenberger v. *First State Bank*, 219 U. S. 114, 55 L. Ed. 117.

> "The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."
>
> *Noble State Bank* v. *Haskell*, *supra* (syllabus).

In *Witt, Receiver*, v. *Peoples State Bank*, *supra*, the Court says:

> "The regulation of banks and legislation as to insolvent banks are special matters peculiarly within the province of legislative action."

The opinion of the Supreme Court of South Carolina in this case quotes from *Re Pittman*, 31 Nev. 43, 22 L. R. A. (N. S.) 266, in part as follows:

> "To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is not only clearly within the powers of the legislative department of government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."

Mr. Justice Holmes, in delivering the opinion in the case of *Noble State Bank* v. *Haskell*, *supra* (with regard to legislation on banking), said:

> "It may be said in a general way that the police power extends to all the great public

needs. * * * The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end."

II.

Because the said Act obviously and manifestly does not deprive the applicant of property or any contractual right or due process of law, but relates to the remedy by which his property and rights may be preserved and secured to him.

The exercise of the police power does not violate vested rights or take property without due process of law.

Barbier v. *Connally*, 113 U. S. 27, 28 L. Ed. 923;

New York & N. E. R. Co. v. *Bristol*, 151 U. S. 566, 38 L. Ed. 269, 14 Sup. Ct. Rep. 437.

"It is likewise thoroughly established in this Court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied lia-

bility to governmental regulation in particulars essential to the preservation of the community from injury."

New York & N. E. R. Co. v. *Bristol, supra.*

"When the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

Miller v. *Schoene, State Entomologist,* 276 U. S. 272; 72 L. Ed. 569.

III.

Because by subsequent Act of the General Assembly of the State of South Carolina entitled "An Act to provide for the liquidation of banks or banking institutions after a conservator has been appointed", approved by the Governor of the State of South Carolina 16 May, 1933, and now of force, it was further enacted as follows:

"*An Act*

To Provide for the Liquidation of Banks or Banking Institutions After a Conservator Has Been Appointed.

SECTION 1. Be it enacted by the General Assembly of the State of South Carolina: When the Governor shall conclude, after advising and consulting with the Board of Bank Control, that any bank for which a Conservator has been or hereafter shall be appointed, is insolvent or in imminent danger of insolvency and it is neces-

sary in order to protect the interest of depositors and creditors to liquidate such bank, he shall order the liquidation thereof; and when liquidation shall have been so ordered the same shall be under and by the Conservator appointed for such bank, and shall continue until the liquidation of said bank has been completed. And such Conservator shall be vested with the same powers and duties as receivers of banks under existing laws, except as in his discretion the Governor acting with the Board of Bank Control shall fix or limit the liquidating expenses of such bank or banking institution. The liquidation of all such banks shall be under such rules and regulations as may be prescribed by the Governor after consulting and advising with the Board of Bank Control, and the Conservator shall have the right to apply to a court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank.

SECTION 2. The depositors of any such bank in liquidation shall be authorized by the vote of a majority present at a meeting of such depositors called by such Conservator or order of the Governor after ten days' notice to each depositor by mail, at his last known post office address, to select a committee of not exceeding three depositors to confer and advise with the Conservator and the Board of Bank Control, in the liquidation of said bank. It shall be the duty of the Conservator to call the depositors together for the purpose of electing said committee and he is hereby requested to call said meeting.

SECTION 3. That all appointments of Conservators heretofore made by the Governor by and with the advice of said Board of Bank Control shall be and hereby are ratified and confirmed.

SECTION 4. The term "banks" as used in this Act shall be construed to include cash depositories, building and loan associations and other institutions doing a banking business.

SECTION 4 A. That the terms hereof shall not be applicable to banks, at present, in liquidation under a receivership appointed by the order of Court, and this Act shall not annul, invalidate or remove any Receiver engaged, at present, in the liquidation of any bank.

SECTION 5. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SECTION 6. This Act shall take effect immediately upon its approval by the Governor.

Approved the 16th day of May, 1933.

I. C. BLACKWOOD,

Governor."

That said Act is in *pari materia* with the Act of 9 March, 1933, and the Acts should be construed together; and it being admitted that a conservator for the said The Central Union Bank of South Carolina has been appointed, and it being urged by the appellant as ground for this appeal that said bank is insolvent, it is manifest that the conservator thereof under the terms of the said Acts is or "shall be vested with the same powers and duties as receivers of banks under existing laws", and that the appellant, while his remedy as provided by previous laws

has been changed, has not by the provisions of the said Act been deprived of his property or property rights, but the same will be protected and preserved by the method provided thereby for the rehabilitation or liquidation of the said bank.

IV.

Because the stockholders' liability, the benefit of which is claimed by the appellant, under the provisions of said Acts will be protected and preserved by the conservator, pursuant to the powers conferred upon him, as effectively as by a receiver acting under the previous provisions of law.

"The Legislature has authority to prescribe and limit the method and manner of enforcing depositors' rights against the banks and the stockholders thereof."

Branchville Motor Company v. *Tilden*, 158 S. C. 90, 155 S. E. 277;

Fischer v. *Chisholm*, 159 S. C. 395, 157 S. E. 139;

Ex parte Love, 158 S. C. 249, 155 S. E. 428;

Graham, Receiver, v. *Berry*, 166 S. C. 277, 164 S. E. 755.

"Contract obligations under a banking corporation charter which is subject to alteration and repeal are not unconstitutionally impaired by the regulation of their business under the police power of the State."

3 *R. C. L.* 380.

Noble State Bank v. *Haskell*, 219 U. S. 104, 55 L. Ed. 112.

Charters in South Carolina are all subject to legislative amendment and repeal.

Const. of 1895, Art. 9, Sect. 2.

Furthermore this is a matter involving alleged rights claimed under the constitution and laws of the State of South Carolina, as to which, under the settled decisions of this Court, the decision of the State Supreme Court is accepted as final and will not be reviewed by this Honorable Court.

For the foregoing reasons, and upon the ground that the questions raised by the appeal herein and on which the decision of the cause depends are so unsubstantial and controlled by settled principles of law as not to require further argument, the appellees present this motion and apply to this Honorable Court to affirm the said judgment and decision of the Supreme Court of the State of South Carolina from which said appeal is taken.

JOHN M. DANIEL,
Attorney General,
J. IVEY HUMPHREY,
Assistant Attorney General,
IRVINE F. BELSER,
Attorneys for Appellees.

COLUMBIA, S. C., 15 June, 1933.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, Representing Himself and all Other Depositors of the Central Union Bank of South Carolina, etc., APPELLANT,

versus

SIMPSON J. ZIMMERMAN, Individually and as Conservator of the Central Union Bank of South Carolina et al., APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

ARGUMENT FOR APPELLEES

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Attorneys for Appellees.

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INTRODUCTORY SUMMARY

This appeal challenges the constitutionality of the South Carolina Emergency Banking Act of March 9, 1933.

This Act was passed for the primary purpose of providing for a period for the examination of the banks of the State so as to determine which of the said banks might safely reopen, and vested the Governor with plenary powers over the banks of the State and with power among other things to suspend payments by the said banks and prohibiting all suits against the said banks for a period of eighteen months. The South Carolina Supreme Court upheld the Act as a valid exercise of the police power of the State.

It is submitted that the said Act was passed for the lawful purpose of promoting the safety of banking in the State of South Carolina and of protecting the rights of the depositors therein, and reasonably tended to accomplish that purpose, and hence was a valid exercise of the police power of the State, both on account of the nature of the business regulated, to wit, banking, and also on account of the emergency of the time.

Noble State Bank v. Haskell, 219 U. S. 104, 255 L. ed. 112;

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128;

Witt, Rec. v. Peoples State Bank of S. C., 166 S. C. 1; 6 R. C. L. 187-189

Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566;

Buchanan v. Warley, 245 U. S. 59, 69 L. ed. 149;

Block v. Hirsch, 256 U. S. 135, 65 L. ed. 865;

Moreover the police power of the State extends to and embraces the right if need be not only to interfere with appellant's normal property rights, but also to impair the obligation of his contract with the bank in question.

6 R. C. L. 187-189; 6 R. C. L. 347-348;

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 U. S. (L. ed) 989;

Butchers' Union Slaughter-House Co. v. Crescent City Live Stock Landing Co., 111 U. S. 746, 4 S. Ct. 652, 28 U. S. (L. ed.) 585;

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 U. S. (L. ed) 611, affirming 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161;

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 U. S. (L. ed) 979;

Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341, 52 U. S. (L. ed.) 630;

Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 U. S. (L. ed) 828, 14 Ann. Cas. 560.

Furthermore, inasmuch as appellant claims the Bank should be liquidated, the whole effect of the Act is to change the method for the appointment of the receiver from appointment by the Court upon nomination of the depositors to appointment by the Governor, which is a permissible change of remedy without depriving appellant of his property or impairing the obligation of his contracts.

Sturges v. Crowinshield, 4 Wheat. 122, 4 U. S. (L. ed) 529;

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 U. S. (L. ed.) 773;

Ogden v. Saunders, 12 Wheat. 213, 6 U. S. (L. ed.) 606;

Wilson v. Standefer, 184 U. S. 399, 22 S. Ct. 384, 46 U. S. (L. ed) 612;

Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 U. S. (L. ed) 1163, 11 Ann. Cas. 589;

State v. Carew, 13 Rich. L. (S. C.) 498, 91 Am. Dec. 245;

Wardlaw v. Buzzard, 15 Rich. L. (S. C.) 158, 94 Am. Dec. 148;

6 R. C. L. 347-348

6 R. C. L. 356-357

STATEMENT AS TO THE FACTS

This appeal challenges the constitutionality of the Emergency Banking Act passed by the South Carolina Legislature on March 9, 1933.

This is an appeal from a decision of the South Carolina Supreme Court filed May 11, 1933, upholding the said Act and granting a writ of prohibition against a suit instituted by the appellant on April 11, 1933, in violation of the said Emergency Banking Act, and which attacked the constitutionality of the said Act.

Act Passed March 9, 1933, to Provide for Examination of Banks to Determine Which Banks Could Safely Reopen

The basic facts out of which this case has arisen are largely matters of public knowledge and are practically undisputed (though there are some minor inaccuracies in appellant's pleadings), and are briefly as follows:

At the time of the inauguration of President Roosevelt on March 4, 1933, the banking situation throughout the United States and in the State of South Carolina was in a state of chaos. Many cities and states had declared moratoria against payments by banks, and banks everywhere were suspending operations and closing their doors. Up to that time the banks in South Carolina had not generally been closed or suspended operations, but after the President of the United States declared a national banking holiday, Governor Blackwood of South Carolina, who was in Washington at the time of the inauguration, issued a proclamation closing all the banks in the State of South Carolina, including the Central Union Bank of South Carolina, until further notice. This proclamation went into full effect on Monday, March 6, 1933.

These are largely matters of common knowledge and need not be repeated here. We adopt the language of the South Carolina Supreme Court as giving a fair description of these general conditions:

"We need not dwell here upon the serious conditions which prevailed in banking circles prior to and at the time of the

passage of the 1933 Act, and which still prevail, to a greater or less degree. These conditions are matters of common knowledge and existed, not only in this State, but throughout the nation. Even the solvent banks, because of general conditions, were unable to properly function. Many banking institutions were loaded with assets that could not be liquidated. Gold in large quantities was withdrawn for purposes of hoarding; lack of public confidence in the soundness of the banks caused the abnormal withdrawal of deposits; and a nightmare of uncertainty and panic threatened with disaster the business life of the country. It was only firm and timely action of the President of the United States and of the Governors of the several States which prevented the entire and immediate collapse of our financial system and the wrecking of our banking institutions everywhere. The causes that brought about these conditions are not here matters for consideration. We are concerned only with the undisputed existence of a serious emergency, imperatively requiring that something be done for the protection and safety of the public and for the common good; and the situation was of such nature as to require heroic action. It is evident that the Legislature, in its enactment of the 1933 law, intended to meet this emergency and thereby to provide a remedy and a method of administering banking affairs for the purpose of protecting, as far as possible, the property and rights of the public generally. Some of the banks were sound, but closed temporarily because of existing conditions; others, while not perhaps absolutely sound, were in such condition that they might by reorganization be made to function normally; while still others might be insolvent,—and these being, in the circumstances, a menace to the whole system, required such special consideration and treatment as their peculiar conditions might indicate, in order to obviate or lessen the general danger which they created." (Tr. p. 34-35).

In view of these circumstances the South Carolina Legislature, which was then in session, passed the Emergency Banking Act which was approved on the 9th day of March, 1933.

(Tr. p. 12-16, ff. 21-26), giving the Governor of the State broad powers over all the state banks.

This Act vested the Governor of the State of South Carolina with "plenary powers" over the state banks in the State of South Carolina (Sec. 1), specifically authorizing him among other things (Sec. 2) to extend the time for the payment of deposits (a) and to promulgate necessary regulations to enable such banks to comply with the Federal regulations for banks (d) and to order the liquidation of banks in the interest of the depositors (e). The Act further authorized the Governor (Sec. 3) "to make all necessary rules and regulations" with respect to banks, and provided (Sec. 4) that "all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, * * *, from instituting any legal proceedings of any nature whatever against any bank, * * *, without first obtaining the written approval of the Governor", authorized the appointment by the Governor of a Board of Bank Control, (Sec. 7) and provided that the powers granted by the Act should cease eighteen months from the date of the Act (Sec. 10). The Act also contains a good many other provisions relative to the operation and control of the said Bank and banking laws, which, however, do not seem to be particularly pertinent here.

Acting under the authority of this Act the Governor of the State of South Carolina appointed a Board of Bank Control. Thereafter the Governor acting with the approval of the Board of Bank Control at one of its first meetings promulgated a regulation analogous to the Federal regulations providing for the appointment of Conservators in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof. (Tr. p. 16-20, ff. 26-31). This regulation authorized the receipt of special trust deposits by such banks while under the control of Conservators and also provided rules for reorganizing (ff. 28-29) and for reopening (f. 30) such banks.

It provided in effect also that the Conservators should take possession of the assets of the Bank and should have "all the rights, powers and privileges now possessed by or hereafter

given Receivers of insolvent state banks" and should be subject to the duties and liabilities of receivers.

This regulation further provided that the Governor should cause such examination of the affairs of such banks to be made as he deemed necessary, and that he might thereafter order the banks to be reopened or reorganized or liquidated as should be found advisable in the interest of the depositors and creditors.

Under the authority of the foregoing Act and pursuant to the said regulation the Governor of the State of South Carolina appointed the appellee Simpson J. Zimmerman as Conservator of the Central Union Bank of South Carolina, the said Simpson J. Zimmerman having been an officer (but not a stockholder) of the said Bank. The said Conservator thereupon took possession of the assets of the said bank and proceeded to administer the said bank pursuant to the said Act and regulation. The Conservator acting under the Governor and the Board of Bank Control was having an audit made and was preparing to issue notices to the stockholders and directors of the said Bank so as to determine whether the Bank should be reopened or reorganized or liquidated, but before the completion of the said audit or the holding of said meetings (Tr. p. 4-5, f. 9) the appellant instituted the suit below mentioned.

On April 11, 1933, Appellant Instituted Suit for Receiver Attacking Constitutionality of Act

On April 11, 1933, the appellant instituted a suit in the Court of Common Pleas for Richland County in the State of South Carolina on behalf of himself and other depositors of the Central Union Bank for the purpose, as therein stated (F. 20), of having the said Emergency Banking Act declared null and void "insofar as the same undertakes to prevent plaintiff and other depositors of the Central Union Bank from bringing and prosecuting this action" (Par. 4), and for the purpose of having a receiver appointed for the said bank (Par. 7) and for the enforcement and collection of the stockholders liability of the stockholders of said bank (Par. 8). In the complaint the

appellant had alleged many of the facts above stated, and particularly alleged (Par. 6, f. 17) that under the Act the bringing of any action against the Bank itself without the approval of the Governor was prohibited, and that he had asked the Governor for authority to bring the suit but the said request had been refused; and that he had been denied access to the records of the Bank, but that according to his information there was practically no chance of reopening the bank or of its reorganization, and that it should be liquidated (Par. 9) and that it was in "danger of insolvency" (Par. 14). The complaint also alleged (Par. 11, f. 18, p. 10), that the said Act was unconstitutional for the reasons that it enabled the Conservator to take possession of his property without an opportunity to be heard and that it deprived him of his contractual right under the constitution of the State to enforce the stockholders' liability.

At the same time the appellant obtained a rule to show cause from the Presiding Judge of the Fifth Judicial Circuit directing the appellees to show cause on the 4th day of May, 1933, why the prayer of the complaint should not be granted and pending the said return enjoining all persons from proceeding against the said Bank or any of its assets in any way except in the said proceeding. (Tr. p. 6-7, f. 13).

Prohibition Suit Instituted April 12, Writ Granted May 11, 1933

The appellees thereupon on April 12, 1933, filed their petition with the Supreme Court of South Carolina in the original jurisdiction for a writ of prohibition against the said suit instituted in the Court of Common Pleas by the appellant, and obtained an alternative writ of prohibition against the said suit returnable before the Supreme Court on April 14, 1933 (Tr. p. 1-6). In this suit the appellees alleged the proceedings in regard to the above mentioned suit, and alleged among other things that the petitioners therein were at the time having an audit made and taking the proper steps to determine whether the Bank should be reorganized or liquidated, but that

the said audit had not yet been completed and that it was impossible to determine what disposition would be made of the Bank, and that the pendency of the said suit was prejudicial to the interest of the said Bank and to its depositors and creditors. (Tr. 4-5 .....). It was also alleged that the above mentioned suit instituted by the appellant was in direct violation of the terms of the said Act, and hence that the writ of prohibition should be issued restraining the further prosecution of the said suit. (Tr. 5-6 .....).

Attached to this petition was a copy of the regulations promulgated by the Governor acting under the terms of the said Act. (Tr. p. 16-20). To this alternative writ the Resident Judge of the Fifth Circuit filed a return, and the appellant filed a return and motion to dismiss and also a return and answer (Tr. p. 21-27).

Appellant's return and answer repeated many of the allegations contained in his suit which he had instituted in the Court of Common Pleas for the appointment of a Receiver and also contained a qualified charge that the said Act was unconstitutional, the language of the return being that "if the purpose was by said Act, or by the administration thereof, to take from the respondent and other creditors and depositors their rights under the Constitution and laws of the United States and of this State, after such rights were vested and fixed, then the said Act is null and void and cannot be and should not be enforced or upheld." (Tr. p. 22-23). There was no direct or specific charge as to which provision of the Act or what interpretation thereof deprived the appellant of his constitutional rights or of what particular constitutional rights. The return and answer did not contain any specific showing as to whether the gravamen of his complaint was that the Act was not being properly interpreted and administered by the appellees or that the Act on the whole or in its essential provisions was unconstitutional.

This matter was argued on April 14, 1933, before the Supreme Court of South Carolina which thereafter handed down its decision on May 11, 1933, upholding the said Act and grant-

ing the writ of prohibition as prayed for. In its decision the South Carolina Supreme Court held that banks are peculiarly subject to state regulation (Tr. p. 31-33, ff. 45-46), and particularly that the provision of the Act prohibiting the institution of suits against the bank—which was the principal point of attack by the appellant in the argument before the Supreme Court—was a justifiable exercise by the state government under the existing circumstances of its police power for the general welfare of its citizens. (Tr. p. 33-35, ff. 46-47).

There was no petition for a rehearing after this decision, but the appeal therefrom was filed and allowed on May 18, 1933.

Subsequent Legislation and Proceedings Providing for Liquidation of Central Union Bank

Since the decision of the Court was rendered and this appeal was allowed there have been certain developments in connection with this situation, which are matters of public record and which though not incorporated in the record herein we conceive should be brought to the attention of this Court.

On May 16, 1933, the South Carolina Legislature passed an Act as stated in its title to "Provide for the Liquidation of Banks or Banking Institutions after a Conservator has been Appointed". The purpose of the Act is indicated in the title. A copy of this Act is attached hereto in the appendix as Exhibit "A".

The Act also as will be seen gives the Conservator "the right to apply to a Court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank".

Also on the 22 day of June 1933, the Governor and the Board of Bank Control passed an order ordering the Central Union Bank into liquidation with the said Simpson J. Zimmerman, appellee herein, as Conservator-Receiver. A copy of the said order is attached hereto in the appendix as Exhibit "B".

Pursuant to the authority contained in the above mentioned Act the Conservator of the said Central Union Bank thereafter instituted on the 26 day of June, 1933, a suit in the Court of Common Pleas for Richland County for instructions and guidance in the administration of the affairs of the bank. That suit is now pending in that Court and all the depositors, including the appellant herein, have the right to go into that suit and assert all of their rights therein.

Also on the 3rd day of October, 1933, the Governor and the Board of Bank Control passed another order appointing J. Roy Barron as a co-conservator of the said Bank. And subsequently on the 1st day of November, 1933, the Governor and the Board of Bank Control declared it necessary to resort to the stockholders liability for the benefit of the depositors and directed the Conservator-Receivers to call for and enforce collection by suit or otherwise. Such call has been made under an appropriate order from the Court, dated November 2, 1933.

Appellant contends in his argument that the Act is unconstitutional for the alleged reasons:

(1) That the Act deprives him of his property without due process of law in that (a) it authorizes the Governor to appoint a Conservator of the bank without notice to him; and (b) authorizes the conservator to carry on the business of the bank in a limited way, in receiving trust deposits without his consent or approval. (Arg. p. 4-6).

(2) That the Act impairs the obligation (1) of his contractual right under the Constitution of the State of South Carolina to enforce the double liability of the stockholders, and (b) of his right to sue the Bank for his deposit, at least for a period of eighteen months. (Appellant's Arg. p. 7-11).

ARGUMENT

I.

The Emergency Banking Act of 1933 Valid Under the Police Power of the State

> "The police power of a State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe."
>
> *Noble State Bank v. Haskell*, 219 U. S., 104, 55 L. Ed., 112.

> "To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is not only clearly within the powers of the legislative department of the government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."
>
> *In re: Pittman v. Nevada*, 99 Pac., 700, 22 L. R. A. (N. S.), 269.

It is respectfully submitted that the said Emergency Banking Act of March 9, 1933, was passed for the purpose of providing an opportunity for an investigation as to the condition of the banks in the State of South Carolina, and of thereby conserving the assets of the depositors in the said banks, and reasonably tended to accomplish that purpose, and hence was a valid exercise of the police power of the State, particularly in view of the serious emergency existing at the time of its passage, under the settled principle that the business of banking is peculiarly subject to State regulation under the police power, and that all regulations adopted in the exercise of that power will be upheld where they reasonably tend to promote a lawful purpose.

Noble State Bank v. Haskell, 219 U. S. 104, 255 L. ed. 112;
Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128;
Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117;
Sherman v. Smith, 66 U. S. 587, 17 L. ed. 163;
Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452;
Witt, Rec. v. Peoples State Bank of S. C., 166 S. C. 1
In re: Pittman v. Nevada, 99 Pac. 700, 22 LRA NS. 269
Augusta Bank v. Earle, 13 Pet. 519, 10 L. ed. 274
State v. Scranton Title & Guaranty Co. Ida 152, P. 189
6 R. C. L. 187-189, 347-348; 355-357
Cooley's Constitution of Limitations, 7th Ed. p. 555-556.
German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011 (At 1020);
State Savings and Commercial Bank v. Alden Anderson, 203 U. S. 267, 59 L. ed. 1489;
Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566;
Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 (at 870);
Jackman v. Rosenbaum Co. 260 U. S. 22, 67 L. ed. 107 (at 111);
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (at 1164);
Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598;
In re: Chetwood (Cal. 1897) 17 S. Ct. 385, 165 U. S. 443, 41 L. ed. 782;
Buchanan v. Warley, 245 U. S. 59, 69 L. ed. 149

Act Passed to Provide for Examination of Banks to Determine Which Banks Solvent

It is obvious that the dominating purpose of the passage of this Act was to provide a period for the investigation of the

condition of banks generally in the State of South Carolina so as to conserve their assets for the benefit of the depositors and creditors, and to prevent all of the banks from being immediately thrown into receivership and closed by reason of the near panic then existing in the minds of the people generally.

This dominating purpose is shown both by a consideration of the terms of the Act itself and of the regulations immediately adopted by the Bank Board and by the Governor pursuant thereto and also by the decision of the South Carolina Supreme Court construing and stating the purpose of the Act. The real purpose was to provide a reasonable opportunity and a method for someone to make an investigation so as to determine which of the banks were perfectly sound and might be safely reopened and which of the banks might by careful handling be reorganized, and which of the banks were in fact insolvent and had to be immediately liquidated. In the state of panic then existing it is obvious that this was a proper purpose and object to be accomplished by the State Legislature.

The doubt and uncertainty which existed at the time as to the condition of all the banks, as was stated by the Supreme Court in its decision (R 34-35) tended to endanger the safety and usefulness even of the perfectly solvent and safe banks. As was stated by the Supreme Court, "A nightmare of uncertainty and panic threatened with disaster the business life of the country," and the Act was intended to meet this emergency and thereby provide a method of administering the banking affairs of the state during this period of investigation, for the purpose of protecting, as far as possible, the property and rights of the public generally.

Under these circumstances it is respectfully submitted that not only was it the right, but the duty of the Legislature to take such means as were within its power to protect the interest of the people and the property and business rights of its citizens by the enactment of appropriate legislation to that end, "To regulate the banking business so as to reduce to a minimum failures of this branch of business enterprise" as

was stated by the Supreme Court of Nevada in the case of *In Re: Pittman* above cited, 99 Pac. 700, 22 LRA, NS, NS 269, **"is not only clearly within the powers of the legislative department of government but it may also be said to be an imperative duty for the legislature to enact laws for prevention, as far as possible, of bank failures."**

That this was in fact the purpose of the passage of this Act will, we apprehend, be conceded in this case.

It is submitted also that this being the purpose, and such purpose being in every sense highly lawful, the Act fully met the test for the proper exercise of the police power as frequently stated by this Honorable Court (See *Buchanan v. Worley*, 245 U. S. 59, 62 L. ed. 149) that "the means adopted reasonably tend to accomplish a lawful purpose."

It is apparent, it is submitted, from a consideration of the Act itself and also from the regulations promulgated by the Governor and the Bank Board that the Act reasonably tended to accomplish the purpose for which the said Act was passed as above stated. The Act, as has been shown, placed the entire supervision and control of the banks in the hands of the Governor of the State of South Carolina. The Governor had been elected by the whole people and certainly it can not be denied that he was the appropriate person in whom to place these powers. The permission granted to the Governor to suspend the time of the payment of deposits was also necessary in order to enable him to make a proper investigation as to the condition of the banks and to conserve the assets of such banks pending such investigation. Also the provision (Sec. 2, sub. c) authorizing the Governor to permit the creation of special trust account subject to withdrawal was advisable in the interest of the people in view of the necessity for some banking facilities (Cf. *Noble State Bank v. Haskell, supra*) and also in the interest of keeping the banks in operation in a limited sense as a going concern. Likewise the power granted (Sec. 2, sub.d) to the Governor to promulgate rules and regulations so as to enable the State Banks to comply with the Federal regulations was obviously proper because of the interconnec-

tion between the State banks and the national banks. Similarly the power contained in (Sec. 2, sub. e) authorizing the Governor to look into and determine whether the overhead expenses exceeded the net income of the banks and if need be to reduce such overhead expenses or order liquidation was properly designed toward the same end.

Also the provision contained in Sec. 4, as to which complaint is made particularly by the appellant prohibiting the institution of suits against such banks while the Governor is in control without obtaining the written approval of the Governor was, it is respectfully submitted, obviously necessary and proper for the same purpose. If, notwithstanding the purpose of the Act which was to give the Governor an opportunity to investigate the condition of the banks, any and every depositor or creditor of such banks should immediately have the right to institute suits against such banks for the purpose of getting judgment or throwing them into the hands of receivers, it is clear that the major purpose of the Act would have been immediately defeated. It is common knowledge that as soon as a bank is closed for any purpose or fails to meet any of its obligations, there is immediate fear that the bank is insolvent which may cause a run and precipitate receivership suits. In fact, the very charge that a bank is insolvent, as was made by the appellant in this case in his suit in the Court of Common Pleas, seriously and adversely affects the credit of any bank and generally gives to a bank a blow from which it cannot recover. It is a criminal offense in South Carolina to charge a bank with insolvency (Code 1932, S. 1230). As was stated by the Supreme Court of South Carolina in its opinion, had it not been for the incorporation into the Act of this provision there would doubtless have been many suits instituted for the purpose of having receivers appointed for the winding up of the affairs of each of the state banks, "which would result in chaos and confusion in the reorganization and rehabilitation of the banking system of the State and thereby defeat the very purpose of the Act." (R. 35, f. 47).

Also the provision of the Act authorizing the Governor to appoint a Board of Bank Control (Sec. 7, R. p. 16) and prohibiting stockholders from transferring their stock (Sec. 9, sub. a, R. p. 16) and the further provision of the Act providing for a cessation of the powers thereby granted after 18 months (Sec. 10, R. p. 16) were all obviously proper and reasonable tending to accomplish the lawful purpose above shown.

It is also submitted that the regulation immediately adopted by the Governor was likewise a proper means to accomplish the said end. This regulation as above shown, and as will be seen from a reference to the said regulation (R. p. 16-20), provides for the appointment by the Governor of conservators who were given the powers and responsibilities of receivers. This provision and also the provision for the Governor to have an examination of the financial condition of the bank and for the termination of the conservatorship, and the provision for the reorganization of the bank (R. p 18, f 28-29) and likewise the provision for the reopening of the bank (R. p 19, f 30) were all, it is submitted, reasonably calculated to accomplish the same lawful purpose.

The action of the Governor in appointing appellee Zimmerman, who was a former officer of the bank and therefore presumably familiar with its affairs, as a conservator for the said bank, and the subsequent action of appellees in having an audit made of the affairs and condition of the bank, in sending out notice to stockholders and directors thereof so as to determine whether the bank should be reorganized or be reopened (R. p 4, f 9) were all reasonably calculated to accomplish the same purpose.

It is submitted, therefore, that the purpose of the passage of the Act was clearly lawful and that the means adopted and authorized in the Act and adopted by appellee to accomplish that lawful purpose reasonably tended to accomplish that purpose and, hence, under the foregoing authorities the said Act was a valid exercise of the police power of the State. These

principles are overwhelmingly supported, established and confirmed, it is submitted, by all the authorities.

Authorities Show Banks Subject to Regulation Under the Police Power

In the above cited case of *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, which is a leading case on this subject and which has been frequently cited with approval by this Honorable Court and other Courts, it was held that (Syllabus, p. 113) "The police power of a State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe."

In that case an assessment based upon average daily deposits for the purpose of creating a depositors guarantee fund had been levied by the State of New York upon the appellant bank. It was contended that this assessment deprived the appellant bank of its property and property rights without due process of law. It was held, however, by this Court that the said statute was a valid exercise of the police power.

In the decision of this Honorable Court rendered by Mr. Justice Holmes, it was said that "We must be cautious about pressing the broad words of the 14th Amendment to a arily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law making power." * * *

"It may be said in a general way," continued the Court, "that the police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518, 42 L. ed 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned

by usage, or held by the morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the **almost compulsory resort of depositors to banks as the only available means for keeping money on hand.** The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S., 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. **The power to compel beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end.** *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633." * * * "The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not an-

swered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above described cooperation are necessary safeguards, this Court certainly cannot say that it is wrong."

The same principle was announced and applied by this Honorable Court in the above cited cases of *Shallenberger v. First State Bank of Holstein*, 219 U. S., 114. 55 L. ed. 117, and *Engel v. O'Malley*, 219 U. , 128, 55 L. ed. 128, in the latter of which it was held that a statute requiring the appellant to obtain a license from the Comptroller of the State of New York in order to engage in the banking business did not deprive him of his property without due process under the 14th Amendment, and that such statute was the proper exercise of the police power of the state. In this case the Court again speaking through Mr. Justice Holmes said that the *Noble State Bank case* has established "that the state may regulate that business, and may take strong measures to render it secure." (55 L. ed. at 136)

The above cited case of *Noble State Bank v. Haskell* has also been cited with approval and followed in the following among many other subsequent cases of this Honorable Court:

German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. ed 1011 (At 1020)

State Savings and Commercial Bank v. Alden Anderson, 203 U. S. 267, 59 L. ed. 1489

Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566 (This case affirming the above case cited by State of Idaho 27 Idaho, 5, 152 Pac. 189.)

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 (at 870) (This case upholding the emergency legislation regulating the letting of buildings in the District of Columbia)

Jackman v. Rosenbaum Co. 260 U. S., 22, 67 L. ed. 107 (At 111)

Farmers and Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (At 1164) (Upholding a state statute regulating the banking business under the police power "for the purpose of protecting the public and promoting the general welfare.")

In the above cited case of *Witt, Receiver v. Peoples State Bank of South Carolina* it was held by the South Carolina Supreme Court that a South Carolina statute providing for preference under certain conditions, among the creditors of insolvent banks, did not deprive the other creditors of their property without due process of law, or any violation of the equal protection clause of the Federal or State constitutions.

The decision in this case was based largely upon the decisions of this Honorable Court as to the peculiar nature of banks, "The regulation of banks and legislation as to insolvent banks," said the Supreme Court of South Carolina in that case, "are special matters peculiarly within the province of legislative action. 2 R. C. L. 379; 12 C. J. 116; 7 C. J. 10; 480; *Noble State Bank v. Haskell*, 219; U. S. 104, 111, 31 S. Ct. 186; 55 L. ed., 112; 32 L. R. A. (N. S.) 1062 Ann. Cas. 1912. 1912-A, 487. 'One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.' *Noble State Bank v. Haskell*, 219 U. S. at page 111, 31 S. Ct. 176, 188, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912-A, 487."

In that case it was also held that this statute creating preference in favor of certain classes of creditors did not impair the contractual rights of the depositors to sue the stockholders on their stockholders liability, this point being based largely upon the above cited case of *Sherman v. Smith*, 66 U. S. 587, 77 L. ed. 168, in which it was held that the legislature might by subsequent legislation place a double liability on stockholders though none existed at the time of their stock subscription.

The same principles are generally recognized and applied by the other general authorities.

"The business of banking is a proper subject for regulation under the police power of the state because of its nature and the relation which it bears to the fiscal affairs of the people and the revenues of the state; and the police power of a state extends even to the prohibition of engaging in the business of banking except upon such conditions as the state may prescribe." * * * "The actual supervision of banking is usually vested in some officer of the state who may properly be vested with visitorial powers and authorized to investigate into the management, the mode of conducting business, and the solvency of banks or bankers, and to take possession of their assets and to wind up their affairs when this appears necessary for the protection of depositors." 7 C. J. 480-482. Citing and abstracting many authorities.

We also call especial attention to the language of the Supreme Court of North Dakota in the case of *North Dakota State v. Woodmansee*, I. N. D. 246, 46 N. W. 970. 11 L. R. A. 420.

"It is true", said the Court, "that it has been held that the provisions relative to personal liberty found in our constitution might be violated by the enactment of a statute which operated to deprive a citizen of the right to pursue a lawful trade or avocation. But on the other hand, it is conceded that the business of banking by reason of the very intimate relations to the fiscal affairs of the people and the

revenues of the state, is and has ever been considered a proper subject of legislative control and strictly within the domain of the internal police power of every state. **As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking.** As a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class and to prohibit to others or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business."

Administrator for Banks Validly Appointed by Civil Authorities

It is also established by the authorities cited in support of the above statements in Corpus Juris that a depositor or a creditor of a bank is not deprived of his property without due process of law by not having the opportunity to participate in the appointment of the official of the state who takes charge of the assets of said bank. See particularly *State v. Scranton Title Guaranty Co.* (Ida.) 152, P. 189, and *In Re: Mandel*, 224 Fed. 642.

In the above cited case of *State v. Scranton Title Guaranty Co.* it was said, "In their motion for a directed verdict appellants also raised the question of the validity of section 73 above quoted. They contend that the law under consideration contemplates that a court proceeding must first be instituted by the bank commissioner before he takes possession of the books, records and assets of the bank or trust company found by him to be involved or which has unlawfully refused to pay the depositors, that the theory of respondents is, in effect, that it is the duty of the bank commissioner upon becoming satis-

fied of one or more of the above mentioned facts, to immediately take charge without instituting a proceeding in court to procure judicial authority so to do. It is appellant's further contention that if said sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the fourteenth amendment of the Constitution of the United States and of section 13 art. 1; and sections 2 and 13, art. 5 of the Constitution of Idaho. We are not in accord with appellant's contention."

The above case from the Idaho Court was subsequently affirmed by this Honorable Court in a very emphatic opinion (240 U. S. 136, 60 L. ed 566) in which it was held in effect that merely to state the contention of the appellant is to demonstrate its want of merit.

> "The proposition under the 14th Amendment relied upon," said the Court in rendering its decision, "is that, consistently with that Amendment, the state had not the power to put upon the bank commissioner the duty of closing the bank in case, on examination, it was found to be insolvent, since such authority, consistently with due process, could only have been exerted after judicial proceedings to ascertain the facts, and the awarding of relief accordingly. The pleadings leave it exceedingly doubtful whether the question thus urged was presented in either of the courts below, and it is, besides, obvious from the opinion of the court below that it considered that the only question raised under the Constitution of the United States was a contention that there would result a want of due process if the state statutes conferred upon an administrative officer the authority to liquidate the affairs of the insolvent bank without judicial proceedings. We say this because, in its opinion, the court observed that if that was the contention, it was irrelevant, as the statutes did not authorize liquidation except as a result of judicial proceedings, although they did impose upon the bank commissioner the duty, after he found a bank

to be insolvent, to close its doors and prevent the further transaction of business until, in the orderly course of procedure, a judicial liquidation might be accomplished. But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the 14th Amendment, because power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189.

Dismissed for want of jurisdiction."
(60 L. ed. p. 569)

Likewise in the case of *In Re: Mandel*, 224 Fed, 642 it was said "The business of private banking is certainly subject to general regulation, such as that of the New York Banking Law, and where the superintendent of banks seized possession of the goods of Mandel because he thought his bank unsafe, it may have been an incident, but it was only an incident, of the right of public control, that he lost a possession that he might have protected against direct process in a criminal prosecution. The incident is one of the misfortunes of insolvency if it follows crime. *In re Harris* 221 U. S. 274, 55 L. ed. 732."

We adopt the language of the Supreme Court of Nevada in the above cited case of *In re Pittman v, Nevada*, 99 Pac. 700, 22 LRA (N. S.) 269, (in which a statute making it a crime for the officer of the bank to receive deposits while the bank was insolvent) as containing an excellent statement of the

reasons for banks being peculiarly subject to state regulations.

"That the business of banking is a lawful business in which it is the inherent right of every citizen to engage will not be questioned. It is a business, however, with which the general public welfare is most clearly identified. **Money is said to be the very life blood of the nation. The banking business has grown to be a part and parcel of our financial system, and it is so regarded by both the Federal and state governments.** The great bulk of business transactions, instead of being effected by an actual transfer of money, is accomplished through the medium of bank checks and drafts. Indeed, it would be next to impossible to carry on the great business transactions of this country, which aggregate hundreds of billions of dollars annually, without the aid of a well organized banking system. It needs no extended argument to establish the fact that the banking business is in a class by itself. The assertion of the fact should be sufficient. While the business of banking may not be prohibited, it may be regulated, and it is of the highest importance to the public welfare that it be regulated by wise legislation. It is a matter of common knowledge that the deposits in the banks of the country exceed many times the total amount of actual money within the country. The solvency of the banks of the country must of necessity rest upon the value of their securities, rather than upon the actual amount of cash which may be within their vaults, very much the same as the wealth of the nation or state is represented, not merely by the amount of money within the treasury or in circulation among the people, but mainly upon the vast resources of the country of every character and description.

"Common experience has abundantly demonstrated that the prosperity of the country is very largely influenced by public confidence in its banking institutions. Anything which tends to shake that confidence and causes depositors in banks to withdraw their deposits, produces contraction in business which may result, and at times has resulted, in panics which

have brought ruin and disaster to thousands and seriously affected the welfare and happiness of the public generally for greater or less periods of time. If a person or corporation engaged in mercantile pursuits, for example, should fail, the injurious results are limited. Such failure does not tend to shake confidence in the business soundness of other similar enterprises. The case is different with banking institutions. The suspension of a bank in any locality causes depositors in other banks in the same locality to become suspicious of the solvency of the bank with which they may be dealing. Withdrawals follow, and if they are sufficiently numerous, a second bank may be forced to, at least a suspension. Every bank suspension tends in a greater or lesser degree to shake confidence in other like institutions. If it happens to be a large and well-known bank which fails, the greater will be the extent of the injury, which its faliure will produce upon other banks, not only in the locality in which the suspended bank is situated, but also in distant places. Thus may be brought about a financial panic of nation-wide extent.

"To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is not only clearly within the powers of the legislative department of the government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."

The foregoing authorities it is respectfully submitted establish beyond a per adventure that the banking business by reason of its nature and intimate relation to the welfare of the people is peculiarly subject to regulation in the highest degree by the state in the exercise of the police powr.

Act Also Justified by Emergency Existing at Time of its Passage

Also it is submitted that the foregoing principle of the police power is applicable in the case at bar not only on account of the nature of the business concerned—that is, of

banking, which necessarily and vitally affects the welfare of the people at all times,—but also on account of the great emergency existing at the time of the passage of the Act. In other words, it is our position that the validity of the Act may rest not only upon the nature of the business affected, but also upon the seriousness of the time and of the purpose for which the Act was passed, independently of the nature of the business.

Block v. Hirsch, 256 U. S. 135; 65 L. ed. 865.

In the above cited case this Honorable Court expressly held that particular circumstances varying in time and place may clothe any particular type of business with a public interest and justify the enactment of legislation in reference thereto which in ordinary times would not be permissible under the constitution.

> "Plainly, circumstances may so change in time or so differ in space,"

said this Honorable Court in the above cited case,

> "as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915 C, 1189, 34 Sup. Ct. Rep. 612; irrigation, in *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1083, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; and mining, in *Strickley v. Highland Boy Gold Minn. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest (*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.* 240 U. S. 30, 32, 60 L. ed. 507, 511, 36 Sup. Ct. Rep. 234), and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State*

Bank v. Haskell, 219 U. S. 404, 110, 111, 55 L. ed. 112, 116, 117, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. . . . "Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile, or has no reasonable relation to the relief sought. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259."

In other words, it is our position in reference to this matter that this legislation, from the standpoint of police power, may be and is justified both by reason of the nature of the business involved—viz: the banking business, and also by reason of the seriousness of the time at which it was enacted. The Act may validly rest upon either basis independently under the police power.

Police Power Covers All Appellant's Objections

In view of the foregoing discussion it is submitted the specific objections sought to be raised by the appellant do not require any separate extended discussion. The police power of the state is in itself a complete answer to all said objections, and under that power all the alleged interference with his property rights and impairment of his contracts may be and is justified.

It is established by authorities too numerous to require discussion that the police power of the state extends to and embraces the right, if need be, not only to interfere with one's normal property rights, but also to impair the obligations of contracts.

6 R. C. L. 187-189; 6 R. C. L. 347-348

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 U. S. (L. ed.) 989;

Butchers' Union Slaughter-House Co. v. Crescent City Livestock Landing Co., 111 U. S. 746, 4 S. Ct. 652, 28 U. S. (L. ed.) 585;

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 U. S. (L. ed.) 611, affirming 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 U. S. (L. ed.) 979;

Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341, 52 U. S. (L. ed.) 630;

Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 U. S. (L. ed.) 828, 14 Ann. Cas. 560.

Act Should be Considered as a Whole

Also it is submitted that the Act in this case in all its component parts must be considered and construed as a whole in the light of its major purpose.

That purpose was to provide an opportunity and a method for an examination into all the banks of the State of South Carolina, with a view to restoring public confidence in the banks which were reopened and providing a procedure for the reorganization or liquidation of such banks as could not be reopened with safety. The Act was statewide in its operation and affected not only the bank in which appellant was interested. Some banks might be, and in fact were, perfectly solvent and were therefore reopened. Others, as subsequently was found out in this case, were not perfectly solvent, could not be reorganized and had to be liquidated.

However, the Act as a whole and the provisions complained of cannot be considered solely in the light of the facts which subsequently developed in the particular bank in which appellant had his deposit. Clearly it would have been and would be a great injustice and hardship upon the other people of the state, who have profited by the Act as a whole, to allow the appellant to upset the Act on account of some fancied (or real) injury to his individual rights. *Sic utere tuo ut alienum non laedas.*

In other words it is our position that the Act cannot be considered solely as a stay law though it has stay law provisions, nor as solely providing for a method for the liquidation of insolvent banks, nor as providing for the operation of banks as depositories. But the Act must be considered as it was, as an Act providing a period of grace for an examination into the banks of the state and providing for the reopening or reorganization or liquidation of the banks as should be found as a result of such examination best in the interests of the depositors therein.

No Merit in Appellant's Objections Even if Separately Considered

In any event it is submitted there is no real merit in any of the specific objections raised by appellant against the Act, even if separately considered.

(a) As to the alleged point (Arg. p. 4-5) that the Act deprives appellant of his property without due process by authorizing the Governor to appoint a Conservator-Receiver without notice to him, it is established by the above quoted authorities that there is no merit in this particular objection even in normal times.

State v. Scranton Title & Guaranty Co. Ida. 152, P. 189;

Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566;

Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598;

In re: Chetwood (Cal. 1897) 17 S. Ct. 385, 165 U. S. 443, 41 L. ed. 782

In re: Mandel, 224 Fed. 642

7 C. J. 480-482

This is a common method of providing for the administration of banks.

7 C. J. 480-482

Also the Comptroller of the Currency appoints the receivers for insolvent national banks "without a previous judicial ascertainment of the necessity for the appointment of the re-

ceiver and of the existence of the liabilities of the bank" (41 L. ed. @ 598) which action is uniformly upheld by this Court.

Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598

Kennedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476;

Casey v. Galli, 94 U. S. 674, 24 L. ed. 168;

United States v. Knox, 102 U. S. 423, 26 L. ed. 216

(b) As to the objection (See Appellant's Arg. p. 5-6) that the Act enables the Conservator to use the assets of the bank to receive and pay out trust deposits, this it is submitted is merely a justifiable exercise of the states "power to compel beforehand, co-operation" which was recognized by this Court in the *Noble State Bank case.*

This provision was justified not only in the interest of the banks should they reopen so as to enable them to retain their customers, but also in the interest of the people because as was stated by the Court in the *Noble State Bank case*, there is "an almost compulsory resort of depositors to banks as the only available means for keeping money on hand".

Also the Act itself (Sec. 2 (e), Tr. 13, f. 23) specifically directs the Governor either to reduce the overhead expense of banks where such expense exceds the net income or to order liquidation. Hence it is submitted this objection is trivial.

(c) As to the contention that the Act impairs the obligation of appellant's contractual right to sue the stockholders on their double liability, this result (if existing at all) is merely an incidental consequence of the Act and the subsequent Act of May 16, 1933 (authorizing the appointment by the Governor of Conservator-Receivers) taken in connection with the 1929 Act (See 1932 Code S. 7855) as construed by the South Carolina decisions (*Branchville Motor Co. v. Adden*, 158 S. C. 90, 155 S. E. 277, *Ex Parte Love*, 158 S. C. 249) holding that only receivers could enforce that liability, and amounts in substance only to a change in the method of appointment of the receiver who enforces that liability.

As a matter of fact neither the Act nor the decision of the South Carolina Supreme Court directly prohibited appellant from suing the stockholders. In fact appellant would not have

had any independent right to enforce that liability (unless the receiver appointed under the 1929 [illegible] had refused to do so) even if the Act had not been passed. *Branchville Motor Co. v. Adden, supra; Ex Parte Love, supra.*

If it be conceded however that the necessary consequence of the Act as construed by the decision of the South Carolina Supreme Court to suspend appellant's contingent right to sue the stockholders—and we are inclined to that view, though the South Carolina Supreme Court has not directly passed on it,—nevertheless it is submitted that this was a justifiable exercise of the police power of the state.

The appellant made his deposit in the bank just as the stockholders acquired stock therein with the knowledge that the State might modify the enforcement of their respective rights and liabilities as the public interest might require.

Sherman v. Smith, 66 U. S. 587, 17 L. ed. 163
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (at 1164);
Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598.
Ex Parte Witt, 166 S. C. 1

A change in the method of enforcing the stockholders' liability does not impair the obligation of the contract.

Hill v. Merchants Mutual Ins. Co., 134 U. S. 515, 33 L. ed. 994;
Henley v. Myers, 215 U. S. 373, 54 L. ed. 240;
Pittsburg Steel Co. v. Baltimore Equitable Soc., 226 U. S. 445, 57 L. ed. 297.

Also in view of the fact that the Conservator-Receivers are now proceeding to enforce the stockholders liability, under orders of the Governor and of the Court, this point is largely academic.

(d) The same reasoning applies to appellant's objection that the Act impairs the obligation of his contractual right to sue the Bank for his deposit, and hence this objection need not be further discussed.

The provision of this temporary period of immunity for the benefit of the banks from suits of all kinds, is in many respects

analogous to the like provision in favor of the estates of decedents which exist in many states and in the State of South Carolina and are universally recognized as valid.

11 R. C. L. p. 214,
S. C. Code 1932, Sec. 8993.

Also it is to be noted that the Act only prohibits suits against the banks "without first obtaining the written approval of the Governor" (R. p. 15, f. 25), and it may fairly be presumed that the Governor would give his approval to the bringing of any appropriate and timely suits.

Likewise it is held that stay laws passed in times of emergency and panic are valid.

10 R. C. L. 1248

Chadwick v. Moore, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267.

II.

Appellant's Objections Go Only to a Permissible Change in the Procedure for the Liquidation of Insolvent Banks

Furthermore, it is submitted, that so far as appellant claims that the Bank is insolvent and should be liquidated, the whole effect of the Act and of the subsequent statute and proceedings (of which this Court should take judicial notice (*Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690; *Hanley v. Donoughue*, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 S. Ct. 242; *Lloyd v. Matthews*, 155 U. S. 222, 227, 39 L. ed. 128, 130, 15 S. Ct. 70) is to change the method of the appointment of the Receiver from appointment by the Court upon nomination of the depositors to appointment by the Governor, which is a permissible change of remedy without depriving one of his property or impairing the obligation of his contracts.

Sturges v. Crowinshield, 4 Wheat. 122, 4 U. S. (L. ed) 529;

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 U. S. (L. ed) 773;

Bronson v. Kinzie, 1 How. 311, 11 U. S. (L. ed.) 143;

Ogden v. Saunders, 12 Wheat. 213, 6 U. S. (L. ed.) 606;

Planters' Bank v. Sharp, 6 How. 304, 12 U. S. (L. ed.) 447;

Penniman's Case, 103 U. S. 714, 26 U. S. (L. ed.) 602;

Wilson v. Standefer, 184 U. S. 399, 22 S. Ct. 384, 46 U. S. (L. ed) 612;

Waggoner v. Flack, 188 U. S. 595, 23 S. Ct. 345, 47 U. S. (L. ed) 609;

Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 U. S. (L. ed) 1163, 11 Ann. Cas. 589;

State v. Carew, 13 Rich. L. (S. C.) 498, 91 Am. Dec. 245;

Wardlaw v. Buzzard, 15 Rich. L. (S. C.) 158, 94 Am. Dec. 148;

Kendall v. Krieger, 23 Wall. 137, 23 U. S. (L. ed) 124

Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 21 S. Ct. 703, 45 U. S. (L. ed) 994.

6 R. C. L. 347-348

6 R. C. L. 356-357

It may be conceded that so far as solvent banks are concerned, the Act effects a substantial change in the rights of such banks and the depositors therein. So far as insolvent banks however are involved—and the appellant has throughout contended that the bank should be liquidated—the Act merely affects a slight change in the procedure for liquidation.

The whole effect of the present Act in regard to the liquidation of a bank is to change the method of the appointment of the receiver from an appointment by the Court upon the nomination of the depositors to an appointment by the Governor. It is submitted, however, that this was and is an entirely proper and permissible change, and probably represented in part, the realization on the part of the Legislature of the impractibility of calling together in any reasonable length of time, the depositors of this and other banks who, in many cases, would number thousands, and would be scattered all over the State of South Carolina.

Also it is to be noted that under the subsequently adopted Act passed by the South Carolina Legislature on May 16 (copy of which is hereto annexed in the appendix), the Conservator was expressly given the right to "apply to a court of competent jurisdiction for directions and instructions on questions arising in the liquidation of any such bank", and under such Act the Conservator in this case has, in fact, applied to the Court and is now receiving instructions from the Court in the liquidation of this bank. Hence the whole effect of the present procedure as compared with the previously prevailing procedure in the State of South Carolina for the liquidation of banks, as to which the appellant, makes no complaint, is that under the present procedure the Governor appoints the Conservator-Receiver, who applies to the Court for instructions in the liquidation of the bank, whereas, under the former procedure, the conservator was appointed by the Court upon the nomination of the depositors. It is respectfully submitted that this is a case where this Honorable Court shall not concern itself with the wisdom of the passage of such legislation, but will leave that matter to the State Legislature (See *Block v. Hirsch, supra; Chicago R. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328).

Such a change of remedies does not in any proper sense deprive the appellant of his property without due process of law or illegally impair the obligation of his contracts.

> "While the legislature may not withdraw all remedies, and thus in effect destroy the contract, modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. This is the rule even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy; however, on this phase of the rule there is some conflict, for it has been held that the altera-

tion must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made. It is enough if the contract is left with the same force and effect, including the substantial means of enforcement which existed when it was made, or sufficient to enforce the contract."

"While it is conceded that a distinction exists between alterations of the remedy which are deemed to be legitimate and those which, under the form of modifying the remedy, impair substantial rights, generally speaking, the difficulties in the way of stating a rule render it imperative that every case be determined on its own particular circumstances; and the question whether a change of remedy impairs a substantial right in the last analysis is ordinarily one as to reasonableness. A test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of the agreement, or which substantially interfere with, or abridge, obstruct or unreasonably delay rights thereunder, impair the obligation."

6 R. C. L. @ p. 359-361, Citing:

Edwards v. Kearzey, 96 U. S. 595, 24 U. S. (L. ed.) 793;

Myers v. Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171;

Tennessee v. Sneed, 96 U. S. 69, 24 U. S. (L. ed.) 610;

Brine v Hartford F. Ins. Co., 96 U. S. 637, 24 U. S. (L. ed.) 858;

Seibert v. Lewis, 122 U. S. 284, 7 S. Ct. 1190, 30 U. S. (L. ed.) 1161;

Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954

III.

Appellant's Authorities Inapplicable to the Case at Bar

We have carefully considered the authorities cited by the appellant in his argument, but it is submitted that none of them have any real bearing upon the question before this Court.

None of the authorities from this Court cited on p. 4 (77 L. ed. 78; 80, 77 L. ed. 254, 77 L. ed. 125), relate to banks. The case of *Sterling v. Constantine*, quoted from by appellant in his argument (p. 6) dealt with the action of the Governor of Texas (Sterling) in undertaking to close the oil wells of the State of Texas, and to oust the courts of their jurisdiction and to substitute martial law therefor. The distinction between that case and the case at bar is too apparent for discussion. Also in that case this Honorable Court in its decision recognized the "broad discretion" which resides in the people of a state in the passage of legislation dealing with matters within the police power, saying:

> "In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. ed. 643, 651, 25 S. Ct. 358, 3 Ann. Cas. 765; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584, 73 L. ed. 856, 859, 49 S. Ct. 430; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. ed. 775, 781, 50 S. Ct. 310",

Also the cases cited from the State of South Carolina by the appellant in his argument (p. 5) (143 S. C. 516, 145 S. C. 1, 136 S. C. 5 11), in support of the proposition that the assets of an insolvent bank are the property of its depositors and creditors, merely held in effect that such assets constitute a trust fund for the benefit of the depositors and other creditors, the same to be administered in accordance with the laws provided by the state for the benefit of such depositors and other creditors. They do not hold, as is apparent even from the quotation from the case of *Rice v. the City of Columbia*, 143 S. C. 516, contended in the appellant's argument (p. 5), that the

assets of such banks are in any proper sense the individual property of any special depositor. In other words, appellant's rights in such assets, as well as the rights of all of the other depositors, are likewise subject to the equal rights of the other depositors in such assets.

Also the case of *First National Bank of San Jose v. State of California*, 262 U. S. 366, 67 L. ed. 1030, merely holds that a state has no authority to regulate or dissolve the contracts of national banks, the point of the case being that the State Legislatures have no authority over the national banks, which are Federal agencies, and the case does not in the remotest degree touch the case at bar, for the reason, among many others, that in the case at bar the bank was a state bank.

Also the case of *Buchanan v. Warley*, 245 U. S. 59, 69 L. ed. 149, cited and quoted from by appellant in his argument (p. 12), involved the constitutionality of a city ordinance which prohibited the purchase of land by colored persons, and did not in any sense involve any question in anywise related, as we conceive it, to the question before the Court in the case at bar. In that case, also, this Honorable Court again recognized the wide discretion vested in the state authorities to pass laws for the promotion of the health, safety and welfare of its citizens.

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare",

said the Court,

> "is very broad, as has been confirmed in numerous and recent decisions of this Court. Furthermore, the exercise of this power, embracing all the legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose."

It is respectfully submitted that in general the argument of the appellant and the authorities therein cited either merely state accepted and undisputed principles, or they are irrelevant to the real issue before this Court.

SUMMARY AND CONCLUSION

By way of summary it is earnestly and respectfully submitted that the Act herein complained of was a valid exercise by the State of South Carolina and its legislative power over the banks of the state for the promotion of the welfare of its people.

The Act was intended to provide a method and an opportunity for an investigation of the banks of the state, for the purpose of determining which of the said banks should and could be allowed to continue operations, unrestricted; which of the said banks might be reorganized; and which of the said banks were insolvent and should be liquidated. In view of the existing financial emergency in the banking world, it is earnestly submitted that such was a highly lawful purpose for the passage of the Act, and that the Legislature was, in fact, under imperative duty to take some means to accomplish this purpose. The provisions of the Act in question clearly show that the means adopted reasonably tended to accomplish that lawful purpose. Hence, under the authorities hereinbefore cited, it was clearly within the power of the State of South Carolina, under its police power, to enact the said legislation even if, as a result thereof, some of appellant's normal property or contractual rights might be to some extent, affected. *"Salus populi suprema lex est."*

As a matter of fact, however, the only effect of the Acts in question as construed by the State Supreme Court, so far as appellant's rights are concerned, is to change the method of the appointment of the receiver for the bank by having such receiver appointed by the Governor instead of being nominated by the depositors and appointed by the court. Such change in method of enforcing appellant's alleged rights in the assets of the bank or as against the stockholders thereof, is clearly permissible not only under the police power, but as being a change in the method of the enforcement of rights which does not substantially impair their value.

It is earnestly submitted that it would be contrary to the basic principles of government as established by this Honorable Court and all of the standard authorities, to hold that the passage of this Act, under the circumstances of this case, was futile. The basic and fundamental objects for the organization of civil government, as recognized by all the authorities, are (1) national defense; (2) the administration of justice; and (3) the general welfare. It is necessary, in the interest of the performance of this basic purpose, for the very existence of the government, that the legislative branch of such government shall have wide discretion in the exercise of its judgment for the promotion of the general welfare. This Court has on many occasions, from the earliest time down to the present, repeatedly announced and applied this doctrine. Under the constitutional form of government, such as that under which we live in this country, it is of course necessary that this Honorable Court should have the ultimate right to declare unconstitutional such Acts of Congress or of the State Legislatures as really transgress the basic and fundamental rights of the people as established in the constitution; however, in the exercise of that power it is respectfully submitted, as has been frequently stated by this Honorable Court, the Court should be very circumspect and should not declare state statutes designed for certain needs unconstitutional unless it is clear that the means adopted do not reasonably tend to promote the needs for which the legislation was enacted.

This is a case, it is respectfully submitted, where it is clear that the purpose in view was lawful and proper, and the means adopted tended to accomplish that purpose; and hence said Acts, as construed by the South Carolina Supreme Court, should be upheld, and the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

JOHN M. DANIEL, *Attorney General,*
MELTON & BELSER,
IRVINE F. BELSER,
Attorneys for Appellees.

APPENDIX

EXHIBIT "A"

AN ACT to provide for the liquidation of banks or banking institutions after a conservator has been appointed

Section 1: Be it enacted by the General Assembly of the State of South Carolina: When the Governor shall conclude, after advising and consulting with the Board of Bank Control, that any bank for which a Conservator has been or hereafter shall be appointed, is insolvent or in imminent danger of insolvency and it is necessary in order to protect the interest of depositors and creditors to liquidate such bank, he shall order the liquidation thereof; and when liquidation shall have been so ordered the same shall be under and by the Conservator appointed for such bank, and shall continue until the liquidation of said bank has been completed. And such Conservator shall be vested with the same powers and duties as receivers of banks under existing laws, except as in his discretion the Governor acting with the Board of Bank Control shall fix or limit the liquidating expenses of such bank or banking institution. The liquidation of all such banks shall be under such rules and regulations as may be prescribed by the Governor after consulting and advising with the Board of Bank Control, and the Conservator shall have the right to apply to a court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank.

Section 2: The depositors of any such bank in liquidation shall be authorized by the vote of a majority present at a meeting of such depositors called by such Conservator on order of the Governor after ten days' notice to each depositor by mail, at his last known post office address, to select a committee of not exceeding three depositors to confer and advise with the Conservator and the Board of Bank Control, in the liquidation of said bank. It shall be the duty of the Conservator to call the depositors together for the

purpose of electing said committee and she is hereby requested to call said meeting.

Section 3: That all appointments of Conservators heretofore made by the Governor by and with the advice of said Board of Bank Control shall be and hereby are ratified and confirmed.

Section 4: The term "banks" as used in this Act shall be construed to include cash depositories, building and loan associations and other institutions doing a banking business.

Section 4-A: That the terms hereof shall not be applicable to banks, at present, in liquidation under a receivership appointed by the order of Court and this Act shall not annul, invalidate or remove any Receiver engaged, at present, in the liquidation of any bank.

Section 5: All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Section 6: This Act shall take effect immediately upon its approval by the Governor.

Approved the 16th day of May, 1933.

I. C. BLACKWOOD,
Governor

EXHIBIT "B"

STATE OF SOUTH CAROLINA

Office of the Governor

Being of the opinion and having concluded after advising and consulting with the Board of Bank Control that the Central Union Bank of South Carolina, for which a Conservator has heretofore been appointed, is insolvent or in imminent danger of insolvency; that the overhead expense of said bank exceeds the net income thereof, and that it is necessary in order to protect the interest of the depositors and creditors to liquidate said bank

IT IS ORDERED:

1. That said bank be liquidated, such liquidation to be under and by the Conservator heretofore appointed for said bank with all powers and duties as provided by law.

2. That the said Conservator proceed promptly with the said liquidation, and that he call together the depositors, after ten days' notice as required by law, for the purpose of selecting a depositors' committee.

Given under the hand of the Governor and the Seal of the State of South Carolina this 20th day of June, 1933.

(Signed) I. C. BLACKWOOD,
Governor

This is to certify that the above is a true and accurate copy of Order issued by the Governor of the State of South Carolina as to the liquidation of The Central Union Bank of South Carolina, the original Order on file with S. J. Zimmerman, Conservator, having been exhibited to me.

Columbia, S. C.
June 22, 1933.

.....
J. B. Baxter, Notary Public for S. C.

SUPREME COURT OF THE UNITED STATES.

No. 117.—October Term, 1933.

Hunter A. Gibbes, representing himself and all other depositors of The Central Union Bank of South Carolina, Appellant,
vs.
Simpson J. Zimmerman, individually and as conservator of The Central Union Bank of South Carolina, et al.

Appeal from the Supreme Court of the State of South Carolina.

[December 4, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

This appeal brings here for review an order of the Supreme Court of South Carolina prohibiting the further prosecution of a bill in equity seeking the appointment of a receiver for The Central Union Bank. An Act of the General Assembly approved March 9, 1933, was held to forbid the maintenance of the proceeding. The appellant, who was plaintiff in the suit asserts that the Act impairs the obligation of contract in violation of the Constitution of the United States. We cannot consider this contention since in his pleading the appellant relied solely on the provisions of the State constitution with respect to the obligation of contracts, and made no reference to Section 10, of Article I of the federal constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section. R. S. § 709; U. S. C. Tit. 28, § 344; *Chicago & Northwestern Ry.* v. *Chicago*, 164 U. S. 454, 457; *Levy* v. *Superior Court*, 167 U. S. 175, 177; *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 131, 134; *Bowe* v. *Scott*, 233 U. S. 658, 665.

The statute was also assailed below and is challenged here as depriving the appellant of the due process guaranteed by the Fourteenth Amendment. A brief statement of the facts is requisite to an understanding of appellant's argument. Prior to March 9, 1933, the statutory provision as to State banks

was, in summary, this: A State official, known as a bank examiner, had general supervision of the operation of these institutions. If a bank became embarrassed or insolvent he might, upon an order of a court, take possession of the assets and business for a period of thirty days, during which time no suits could be brought against the bank. He might restore the bank to the management of its officers, or, if liquidation were required, apply to a court for the appointment of himself or another as receiver. The affairs of the bank were then to be liquidated by the receiver under the supervision of the court. Stockholders were liable to creditors other than depositors only to the extent of any unpaid balance on their shares; but to depositors, in an amount equal to the face value of their shares. It was the duty of the receiver to demand and collect for the benefit of creditors and depositors the amount due from stockholders, and, if necessary, to sue the stockholders individually and collectively therefor.*

Shortly after the declaration of a banking holiday by the President on March 4, 1933, the Governor of South Carolina issued a proclamation temporarily closing the banks in that State. The General Assembly passed, and on March 9 the Governor approved, an Act suspending for eighteen months legislation then applicable to the conduct and liquidation of banks, vesting in the Governor plenary power over State banks, empowering him to extend the time for payment of deposits as the condition of each institution might require; to direct the creation of special trust accounts for receipt of deposits, which should be held separate from other assets and be subject to withdrawal on demand; to determine whether the overhead expenses of any bank exceed its net income, and, if so, to compel it to reduce the expenses or to order immediate liquidation, as might best serve the depositors' interests; and to make all necessary rules and regulations to carry out the intent of the Act. The examiner was prohibited from taking possession of any bank unless authorized so to do by the Governor, and all persons were forbidden, while the Governor remained in control of the banks, to institute any action against a bank, except by the Governor's consent. The Governor was authorized to appoint a board of bank control, with whom he might advise and consult, and to

*Civil Code of South Carolina (1932), §§ 7843, 7844, 7848, 7852, 7854, 7855, 7868.

whom he might delegate powers under the Act. Pursuant to this legislation the Governor appointed a board of bank control and promulgated regulations which provided, *inter alia*, that upon advice of the board he might, where necessary, appoint a conservator for any bank to conserve its assets for the benefit of depositors and creditors, who should possess himself of all books, records and assets, and take all necessary action to preserve the property, "pending further disposition of its business as provided by law". The regulations provided: "Such conservator . . . . shall have all the rights, powers and privileges now possessed by or hereafter given Receivers of insolvent state banks. . . . During the time that such conservator . . . shall remain in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this order, be the same as if a receiver had been appointed therefor." Further regulations dealing with the reopening of solvent banks and reorganization of banks were promulgated, but these are irrelevant to the present case.

The appellee Zimmerman was appointed conservator of The Central Union Bank and entered upon his duties. The appellant, on behalf of himself and other depositors, filed a bill in the common pleas court averring the bank's insolvency, charging that the Act of March 9 is invalid so far as it purports to prevent appellant and other depositors from prosecuting the suit, and praying the appointment of a receiver who should proceed to enforce the stockholders' statutory liability to depositors. The defendants named were the conservator, the Governor, and the State Treasurer, who was also a member of the board of bank control. The court issued a temporary injunction and a rule on the defendants to show cause.

At this juncture the defendants in the common pleas court prayed a writ of prohibition from the State Supreme Court, addressed to the appellant and to the judge of the common pleas court, to stay the equity proceeding. The judge made return submitting himself to such order as the Supreme Court should enter. The appellant filed a demurrer and motion to dismiss, and a return denying the validity of the Act of March 9 and the regulations, and asserting that his right to proceed for the collection of stockholders' liability was a vested property right, to be enforced through a receiver, of which he could not lawfully be

deprived; that the conservator was engaged in receiving and paying trust cash deposits, and the expense of conducting this branch of the business would deplete assets available for payment of depositors. The writ of prohibition was granted.

Subsequent to the judgment of the State Supreme Court certain official action occurred of which we may take judicial notice. On May 16, 1933, there was approved an Act of the General Assembly empowering the Governor, whenever he should determine, after advising with the board of bank control, that any bank for which a conservator had been or hereafter might be appointed, was insolvent, or in imminent danger of insolvency, and liquidation was therefore required to protect depositors and creditors, to order liquidation, which should be accomplished by the conservator, who was to have all the powers and be under all the duties of a receiver, and might apply to a court for instructions on questions arising in liquidation. All appointments of conservators theretofore made were ratified and confirmed. On June 22 the Governor issued an order finding The Central Union Bank insolvent, or in imminent danger of insolvency, reciting that he had consulted with the board of bank control and had found that the overhead expense of the bank exceeded its net income, and directing its liquidation.

The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton*, 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *Backus* v. *Fort St. Union Depot Co.*, 169 U. S. 557, 571; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 158.

Under the Act of March 9, and the regulations, the conservator was endowed with all the functions of a receiver, one of which is the enforcement on behalf of depositors of stockholders' excess liability. If under that Act and the regulations power was lack-

ing the defect was cured by the Act of May 16. Nothing is shown to indicate that the conservator will prosecute the claim against the stockholders in a manner different from that to be pursued under the old law by a receiver or that the State courts will refuse him process to that end. The Act of March 9, the regulations, and the Act of May 16, do not purport, and, so far as we can perceive, do not operate, to deny the depositors participation in the distribution of assets, or in the benefit of the stockholders' excess liability. It is not alleged that the proceedings of the conservator will impose upon creditors of the bank greater burden or expense than would have been the case if a receiver were functioning. The substantive rights existing under the old law are preserved. In no proper sense can it be said that any property of the appellant has been taken, injured or destroyed.

The appellant, however, insists that after the conservator took possession, he accepted special trust deposits which were segregated and against which the depositors were allowed to draw, and in conducting this restricted business the overhead expenses of the institution exceeded its net income. So long as this condition existed, he says his position as a creditor was being jeopardized for the fund to which he must look for payment was being depleted. But he has not averred that the conservator's activities will deplete the bank's resources to such extent that depositors cannot be paid in full; and whatever injury might have been inflicted by a continuation of the business has now been abated for the future by the Governor's order of June 22 directing liquidation. No present advantage could accrue to the appellant from the ousting of the conservator and the appointment of a receiver, who could only liquidate by the methods obligatory on the conservator. In this aspect the case is now moot.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.